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IN THE

Supreme Court of the United States

1132

No. ..... October Term, 1967

BERTERA'S HOPEWELL FOODLAND, INC.,
Appellant,

vs.

ROBERT J. MASTERS, District Attorney of Beaver County, JOHN A. KRZTON, Chief County Detective of Beaver County, LOUIS POLCE and STEVE D. MIHALIC, County Detectives of Beaver County and other Municipal and State Law Enforcement Officers, all members of a class,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS.

	PAGE
Opinions Below	1
Grounds for Jurisdiction	2
Nature of Proceedings	2
Judgment Sought to be Reviewed	2
Statutory Jurisdiction	2
Cases Sustaining Jurisdiction	3
Pennsylvania Statute and Constitutional Provision Involved	3
Questions Presented by the Appeal	4
Statement of the Case	4
Reasons Why Federal Questions Are Substantial	9
A. The Statute Is Vague	9
B. The Statute Is Discriminatory	16
Conclusion	22
Appendix A—Opinion of Court of Common Pleas of Beaver County, Pennsylvania filed May 4, 1966	23
Appendix B—Opinion of Court of Common Pleas of Beaver County, Pennsylvania filed July 27, 1966	49
Appendix C—Opinions of the Supreme Court of Pennsylvania dated November 28, 1967	61
Appendix C-1—Opinion of the Court	61
Appendix C-2—Concurring Opinion, Bell, C. J.	92
Appendix C-3—Concurring Opinion, Roberts, J	97
Appendix C-4—Dissenting Opinion, O'Brien, J.	104
Appendix C-5—Opinion Vacating Decree, Cohen, J.	111

Table of Cases.

Arrizo v. Lincoln, 154 Neb. 537, 48 N. W. 2d 643 (1951)	22
Bantam Books, Inc. v. Sullivan, 372 U. S. 58, 83 S. Ct. 631 (1963)	3

PAGE

Broadbent v. Gibson, 105 Utah 53, 140 P. 2d 939 20
City of Hot Springs v. Gray, 215 Ark. 242, 219 S. W. 2d 930 (1949) 21
Deese v. City of Lodi, 21 Cal. App. 2d 631, 69 P. 2d 1005 (1937) 22
Elliott v. State, 29 Ariz. 839, 242 P. 340 (1926) 22
Giaccio v. State of Pennsylvania, 382 U. S. 399, 402, 86 S. Ct. 518, 520 (1966) 11
International Harvester Co. v. Kentucky, 234 U. S. 216, 221 (1914) 12
Justeen's Food Stores v. City of Tulare, 12 Cal. 2d 324, 84 P. 2d 140 (1938) 22
Lanzetta v. State of New Jersey, 306 U. S. 451 (1939) 12, 13
McGowan v. State of Maryland, 366 U. S. 420, 81 S. Ct. 1101 (1961) 10, 11, 16, 19
Mt. Vernon v. Julian, 369 Ill. 447, 17 N. E. 2d 52, 55 (1938) 20
Pacesetter Homes, Inc. v. Village of South Holland, Illinois, 118 Ill. 2d 247, 163 N. E. 2d 464 (1959) .. 20
Pierce v. U. S., 314 U. S. 306, (1941) 11, 12
Sarner v. Union Twp., 55 N. J. Super. 523, 151 A. 2d 208 (1959) 20
Standard Oil Co. v. California v. Johnson, 316 U. S. 481, 62 S. Ct. 1168 (1942) 3
Terry Carpenter, Inc. v. Wood, 177 Neb. 515, 129 N. W. 2d 475 (1964) 21, 22
Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U. S. 582, 81 S. Ct. 1135 (1961) 16
U. S. v. Cardiff, 344 U. S. 174 (1952) 12
U. S. v. National Dairy Products Corp., 372 U. S. 29 (1963) 11
Winters v. People of State of N. Y., 333 U. S. 507, 68 S. Ct. 665 (1948) 3
Winters v. U. S., 333 U. S. 507, (1948) 12

III.

Statutes.

PAGE

Act of June 24, 1939, P. L. 872, as amended and supplemented by Section 699.15, added September 27, 1961, P. L. 1695, Sec. 1, Title 18, Purdon's Pa. Stat. Annot. Sec. 4699.15, p. 541 (1963 Ed.) 2, 4

Act of June 25, 1948, c. 646, 62 Stat. 929, Title 28, United States Code, Section 1257 (2) 2, 8

Constitution.

United States Constitution 8, 18

Amendment XIV 6, 7, 9, 17

Amendment XIV, Sec. 1 4

Miscellaneous.

57 A. L. R. 2d 975 20

Vol. 82, C. J. S., *Statutes*:

Sec. 163, p. 277 17

Sec. 165, p. 279 17

Sec. 1555, p. 263 17

IN THE

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

The appellant appeals from the judgment of the Supreme Court of Pennsylvania entered on November 28, 1967, affirming the decision of the Court of Common Pleas of Beaver County, Pennsylvania, and appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinion of the Court of Common Pleas of Beaver County is not officially reported. A copy of this opinion

may be found at pages 34 through 64 of the record from the Supreme Court of Pennsylvania, and an additional opinion may be found at pages 68 through 83 of the record of the Supreme Court of Pennsylvania and is printed in Appendix "A" and "B" of this statement. The opinion of the Supreme Court of Pennsylvania as well as the concurring and dissenting opinions are reported at 428 Pa. 20, 236 A. 2d 197 (1967) and are found at pages 86 through 138 of the record from the Supreme Court of Pennsylvania. These opinions are printed in Appendix C-1 through C-5.

Grounds for Jurisdiction

Nature of Proceedings

The proceedings herein involved began by the filing of a complaint in equity in the Court of Common Pleas of Beaver County, Pennsylvania, seeking to have the Act of June 24, 1939, P. L. 872, as amended and supplemented by Section 699.15, added September 27, 1961, P. L. 1695, Sec. 1, which may be found in Title 18, Parson's Pa. Stat. Annot., Sec. 4699.15, p. 541 (1963 Ed.), declared unconstitutional and void.

Judgment Sought to be Reviewed

This appeal seeks to review the final judgment of the Supreme Court of Pennsylvania which was entered on November 28, 1967. The notice of appeal to this Court was filed in the Supreme Court of Pennsylvania on December 18, 1967.

Statutory Jurisdiction

Jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2).

Cases Sustaining Jurisdiction

The following cases are believed to sustain the jurisdiction of the Supreme Court:

Bantam Books, Inc. v. Sullivan, 372 U. S. 58, 83 S. Ct. 631 (1963);

Winters v. People of State of N. Y., 333 U. S. 507, 68 S. Ct. 665 (1948).

Standard Oil Co. v. California v. Johnson, 316 U. S. 481, 62 S. Ct. 1168 (1942).

Pennsylvania Statute and Constitutional Provision Involved

Whoever engages in the business of selling or otherwise dealing at retail in fresh meats, produce and groceries on Sunday shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one (1) year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty (30) days in default thereof.

Each separate sale, or offer to sell, shall constitute a separate offense.

Informations charging violations of this section shall be brought within seventy-two (72) hours after the commission of the alleged offense and not thereafter.

This section shall not apply to any retail establishment employing less than ten persons or to any retail establishment where fresh meats, produce and groceries are offered or sold by the proprietor or members of his immediate family or employing less than ten persons nor shall it apply to any retail establishment where food is prepared

on the premises for human consumption. 1939, June 24, P. L. 872, Sec. 699.15, added 1961, Sept. 27, P. L. 1695, Sec. 1; Title 18, Purdon's Pa. Stat. Annot., Sec. 4699.15.

United States Constitution, Amendment XIV, Sec. 1:

> "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented by the Appeal

1. Is the Pennsylvania statute, the Act of June 24, 1939, P. L. 872, sec. 699.15, added September 27, 1961, P.L. 1965, Sec. 1; 18 P. S. 4699.15, which prohibits the retail sale of fresh meat, produce and groceries except in stores which are family operated, employ less than ten persons, or where food is prepared on the premises, in violation of the Fourteenth Amendment, Section 1, to the United States Constitution as being vague and indefinite and thus a denial of liberty and property without due process of law?

2. Does the statute, the Act of June 24, 1939, P. L. 872, Sec. 699.15, added September 27, 1961, Sec. 1; 18 P. S. 4699.15, which exempts certain persons from the operation of the criminal statute and is enforced against others similarly situated, a violation of the constitutional provisions of the equal protection clause of the United States Constitution, Amendment XIV, Section 1?

Statement of the Case

The appellant herein, Bertera's Hopewell Foodland, Inc., is a Pennsylvania business corporation which is the owner and operator of a food store in Hopewell Township, Beaver County, Pennsylvania. Appellant operates its food

store under the name of Bertera's Foodland and is engaged in the sale of fresh meats, produce and groceries at retail. It sought to operate its store seven days per week.

However, the Legislature of the Commonwealth of Pennsylvania enacted specific legislation dealing with the retail sale of fresh meats, produce and groceries on Sunday. In the first paragraph of the statute the Legislature prohibited the sale of these items on Sunday and imposed criminal sanctions. In the second and third paragraphs they enacted procedural requirements. However, in the fourth paragraph the Legislature provided for so many exemptions that the statute became so vague and uncertain that one could not ascertain its coverage, and the exemptions created a situation in which persons similarly situated were treated differently. Instead of class legislation it became special legislation.

It is a fundamental principle that, the Legislature in creating an offense that was not a crime at common law, must be explicit, and if the statute does not inform a person who is covered or what conduct constitutes a violation, it is vague. Because of the confusing exemptions the appellant would have to guess as to whether or not it was covered. Furthermore, inasmuch as the statute was not applicable to all members of the class, it is special legislation and thereby denied the appellant equal protection of the law.

The statute exempted retail establishments employing less than ten persons, but it did not say whether this meant total employees or the number who worked on Sunday. The second exemption was where the groceries were offered for sale by the proprietor or members of his immediate family or employing less than ten persons. It was very unclear as to what was meant by this exemption because

under it if the proprietor were on the premises, could he not employ a hundred persons, and were not family-held corporations such as the appellant herein exempt? The third exemption was for retail establishments where food is prepared on the premises for human consumption. Under this, could not a store employ a hundred persons and be opened if it prepared food on the premises, where another of the same size which did not prepare food had to close?

To resolve these apparent defects and to obtain a decision by the Court that the statute was either or both void for vagueness and in violation of the due process clause of the Fourteenth Amendment or constituted special legislation in violation of the equal protection clause of the Fourteenth Amendment, the appellant sought relief from the equity court in Pennsylvania.

A complaint was filed in the Court of Common Pleas of Beaver County, Pennsylvania, on July 15, 1964. In this complaint the appellant raised the issues that the Pennsylvania statutes was in violation of the Fourteenth Amendment in the United States Constitution. These allegations are contained in appellant's complaint which appears at pages 5 through 10 of the record and, specifically, on page 8, paragraph 9. The defendant in the equity action and the appellee herein filed an answer to the complaint in which they admitted all the factual allegations made by the appellant except that they denied that the law was in violation of the Constitution of the United States.

After hearing, the Court of Common Pleas of Beaver County filed its opinion on May 4, 1966. In its opinion the Court found that the statute was not unconstitutional as being so vague and indefinite as to violate the Fourteenth Amendment to the Constitution of the United States. It

also found that the statute did not violate the equal protection clause of the Fourteenth Amendment in that it was not discriminatory. The appellant took exceptions to the decision of the Court and on July 27, 1966, the Court filed an opinion in which it overruled the exceptions to its prior opinion.

On August 1, 1966, the appellant herein filed its appeal to the Supreme Court of Pennsylvania. In the appeal the issues of the invalidity of the state statute as being in violation of the Fourteenth Amendment to the United States Constitution were raised. These issues were argued before the Court. The Supreme Court of Pennsylvania recognized, on the first page of its opinion which is found at pages 86 and 87 of the record, that the appellant contended that the statute violated the Fourteenth Amendment to the Constitution. The opinion of the Supreme Court of Pennsylvania specifically stated:

> "The plaintiff refused to cease Sunday operation, claiming that the Amendment of 1961, above cited, was unconstitutional in that it violated the 14th Amendment to the Constitution of the United States and Article III, Sec. 7 of the Pennsylvania Constitution, averring it to be vague, indefinite, failed in equal protection and was not based on real and substantial differences which are reasonably related to the purpose of the law. The plaintiff went into the Court of Common Pleas of Beaver County to seek an injunction restraining the District Attorney and other law prosecuting officers in the county, from enforcing the statute in question.
>
> "The lower court held that the statute was constitutional, the injunction was denied and the Complaint dismissed. The plaintiff appealed." 428 Pa. 20, 23, 236 A. 2d 197, 199 (1967), appendix, page 62.

In its opinion, which is found at page 84 of the appendix, the Supreme Court of Pennsylvania concluded by holding as follows:

"We affirm the decision of the lower court that the Act of 1961 is constitutional." 428 Pa. 20, 44 (1967).

It is submitted that the appellant herein raised by its pleadings in the trial court the issue that the act of the Pennsylvania Legislature was in violation of rights protected by the Fourteenth Amendment to the United States Constitution. When the decision of the trial court was adverse to it and sustained the statute, an appeal was taken to the Supreme Court of Pennsylvania.

The constitutional issues were raised in the Supreme Court of Pennsylvania. The validity of the statute was affirmed by a sharply divided court. An opinion was filed by the Court, but none of the other justices joined with the opinion filed by Justice Musmanno. Justice Jones and Eagen only concurred in result (appendix, page 85). The Chief Justice filed a separate concurring opinion (appendix, page 92), despite a finding that the third exemption was vague and indefinite. Justice Roberts filed a separate concurring opinion (appendix, page 97) in which he found the first and second exemptions vague and indefinite. Justice Cohen filed a separate opinion on vacating the decree (appendix, page 111). Justice O'Brien filed a dissenting opinion (appendix, page 104).

The issue was clearly raised in the state court questioning the validity of a statute of Pennsylvania as being repugnant to the Constitution of the United States. The decision of the Supreme Court of Pennsylvania was in favor of the validity of the state statute. Accordingly, there has been a final decree by the highest court of the Commonwealth of Pennsylvania which may be reviewed by the Supreme Court of the United States pursuant to the authority contained in the Act of June 25, 1948, c. 646, 62 Stat. 929, Title 28, United States Code Sec. 1257 (2).

Reasons Why Federal Questions Are Substantial

A. The Statute Is Vague.

The issues involved in this case present a substantial federal question inasmuch as the Commonwealth of Pennsylvania is seeking to enforce a criminal statute which is vague and is discriminatory between persons similarly situated. In such circumstances the statutory provisions violate the Fourteenth Amendment to the United States Constitution in that it will, because of its vagueness, deny the appellant liberty and property without due process of law, and its provisions deny the appellant equal protection under the law as they discriminate between persons similarly situated.

Pennsylvania is one of the more populous states in the country. It is an industrial state in which most major manufacturing plants are operating seven days per week. The appellant is a small family-owned corporation which operates a grocery super-market. It seeks to be able to sell groceries, produce and meats to its customers seven days per week. There are many similarly situated businesses in Pennsylvania.

Yet, the Commonwealth of Pennsylvania, under the guise of the so-called Sunday Blue Laws, seeks to discriminate against the appellant. The Legislature prohibited the sale at retail of groceries, fresh meats and produce on Sunday, except it said they could be sold by any establishment that (1) employs less than ten persons, or (2) that are offered or sold by the proprietor or the members of his immediate family or employing less than ten persons, or (3) groceries, fresh meats and produce could be sold on Sunday where food was prepared on the premises for human consumption.

The appellant was and still is, despite the ruling by the Supreme Court of Pennsylvania, in a dilemma as to the coverage of the Act. It did not know what was meant by the exceptions and sought a determination by the courts. Unfortunately, all that was obtained was a ruling by a sharply divided Court that the statute was valid. The so-called majority opinion was written by Justice Musmanno, but no other justice appeared to agree with what he said. The Chief Justice did not join in this opinion, but filed a separate concurring opinion in which he recognized that the third exemption as to the preparation of food is unclear and, hence, invalid. Nevertheless, he voted to sustain the statute.

Justice Roberts wrote a lengthly concurring opinion in which he pointed out that two of the exemptions in the Act were discriminatory and invalid, yet he voted to sustain the Act without the exemptions.

Justice Cohen in his opinion stated that the Court should not hear the case.

Justices Jones and Eagen did not join in any opinion, but merely concurred in the result which affirmed the statute.

Justice O'Brien filed a dissenting opinion.

Thus, the appellant is more perplexed now that its case has reached the Supreme Court of Pennsylvania. It did not know what it could do under the statute when it went to Court, and the Supreme Court of Pennsylvania in reality has been unable to decide what this law of Pennsylvania means.

The Supreme Court of Pennsylvania sought to justify their decision in this case by making reference to the decision of this Court in *McGowan v. State of Maryland*, 366

U. S. 420, 81 S. Ct. 1101 (1961), which held that a state legislature could enact a valid Sunday closing law. We do not contend that the Legislature in the Commonwealth of Pennsylvania could not do this. It is our contention that while the Legislature has the *power* to enact a valid Sunday closing law, they do not have the *authority* to enact an invalid Sunday closing law.

This Court has pointed out in *Giaccio v. State of Pennsylvania,* 382 U. S. 399, 402, 86 S. Ct. 518, 520 (1966) as follows:

> "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. * * * Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce * * *."

The United States Supreme Court, in *U. S. v. National Dairy Products Corp.,* 372 U. S. 29 (1963), stated:

> "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. *United States v. Harris,* 347 U. S. 612, 617, 74 S. C. 808, 811, 98 L. Ed. 989 (1954) * * *."

It is well established that penal statutes must define crime with appropriate certainty and definiteness, and that the test applied is whether the language conveys sufficient definite warning as to proscribed conduct when measured by common understanding and practices. *Pierce v. U. S.,*

314 U. S. 306, (1941). The standards of certainty are higher than for statutes depending upon civil sanctions for their enforcement. *Winters v. U. S.*, 333 U. S. 507, (1948). Such statutes should not admit of such a double meaning that a citizen may act in one conception of its requirements and the courts in another. An act so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *International Harvester Co. v. Kentucky*, 234 U. S. 216, 221 (1914).

The requirement of definiteness and certainty in a penal statute refers not only to the conduct that is proscribed thereby, but also with respect to the definition of persons within its scope. Thus, a criminal statute is violative of due process because of uncertainty with respect to persons within the scope of the statute as well as with respect to the applicable tests to ascertain guilt. *U. S. v. Cardiff*, 344 U. S. 174 (1952).

The Supreme Court of the United States pointed out in the *Cardiff* case that:

> "The vice of vagueness in criminal statutes is the treachery they conceal in determining what persons are included or what acts are prohibited." *United States v. Cardiff*, 344 U. S. 174, 176 (1952).

The Supreme Court of the United States declared that when a statute failed to define the persons within the scope of the crime, it was unconstitutional for vagueness. In *Lanzetta v. State of New Jersey*, 306 U. S. 451 (1939), this Court held that a statute must clearly define who is a person within the scope of the statute. There, the Court said the words "known to be a member" were ambiguous.

> "* * * the terms it employs to indicate what it purports to denounce are so vague, indefinite and uncer-

tain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment." *Lanzetta v. State of New Jersey,* 306 U. S. 451, 458 (1939).

The Pennsylvania Legislature created a new offense and this Court has pointed out that when this is done,

> "the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Lanzetta v. State of New Jersey,* 306 U. S. 451, 458.

Here, the statute while it singles out a separate class of merchandise and prohibits the sale on Sunday, it in the same section exempts many sales in such language that it is impossible for appellant to know whether activities on its part are criminal or lawful.

The act prohibits the retail sale on Sunday of fresh meats, produce and groceries. The substantial problem is as to what persons are within the scope of the prohibition.

Retail establishments employing less than ten persons are exempt. The statute does not inform us as to whether less than ten working only on Sunday invokes the exemption or whether it applies only to those having a total of less than ten employees even if they do not all work on Sunday. A retail establishment may have more than ten employees but never have ten or more working at one time or it may have more than ten on week days but less than ten on Sunday. If only those working on Sunday are con-

sidered, an establishment could alter its operation so as to come within the exemption. Unfortunately, the owner must guess as to its meaning with a risk of fine and imprisonment if he is wrong. The decision of the Supreme Court of Pennsylvania does not really clarify the problem.

The act also exempts any retail establishment where fresh meats, produce and groceries are offered or sold by the proprietor or members of his immediate family *or* employing less than ten persons. The meaning of this defies the imagination. Must all persons offering or selling for sale be proprietors or members of his immediate family, or is it sufficient if one of this class does so in addition to other employees? Must such a person be present at all times when such sales are made on Sunday or is such employment at any time sufficient? Since any establishment having less than ten employees is exempt, does this provision apply only to proprietors with more than ten persons in their immediate families? What is the application of the exemption to partnerships or closely owned corporations? Is a large partnership exempt while a solely owned corporation is not? What is the "immediate family"? The uncertainty as to coverage by the act, as demonstrated, would seem to clearly render the statute void for vagueness.

The remaining exemption provision is as to those retail establishments where food is prepared for human consumption. Any retail seller of meat cuts, grinds or otherwise alters it on the premises for human consumption. Must the food be consumed on the premises or can it be taken out to eat? Are "take out" establishments exempt or are they not? Must the establishment be open exclusively for this purpose or will a small lunch counter cause an entire supermarket to be exempt? Will a popcorn machine make

the difference? If so, can a supermarket with a popcorn machine, a chicken barbeque machine or a hot dog vending counter remain open while one with butchers who prepare chickens for consumption off the premises cannot?

The exemption provisions are so vague and uncertain that no person can establish whether he is covered by the act or not. Furthermore, can he possibly be exempt at one moment and not exempt at the next—by an employee leaving or a proprietor coming on the premises? These uncertainties allow each judge or jury to determine for themselves whether a particular enterprise is or is not exempt. A highly valued right depends upon the disposition of the judge or jury and different standards could be applied by different judges in the very same county.

These questions that we raise are not really answered by the Supreme Court of Pennsylvania. Justice O'Brien in his dissent points out that the justices of the highest appellate court of Pennsylvania are unable to agree on the meaning of the Act, and indicates that the meaning of the Act is "not so crystal-clear as the majority would have one believe."

We submit the opinions of the various justices is ample proof that this statute is vague. The Supreme Court of Pennsylvania committed fundamental error by relying on the doctrine that a Sunday closing law could be enacted, and failed to really decide the constitutional issue of vagueness.

A state statute which provides criminal penalties for the sale of food certainly affects the overwhelming majority of the people of this state. In such a situation should not a statute be crystal-clear? Is it not vague when none of the seven justices of the highest court in Pennsylvania

can agree on its meaning? In any event, in such a situation when millions of citizens of Pennsylvania are affected by a decision of the Court in the acquisition of food, should not this Court accept jurisdiction to determine whether or not the citizens of Pennsylvania are being denied the right to buy food through a statute which is vague? Certainly nothing is more basic than food. Despite all technical space age advancements, no one has yet devised a method of living without food. Any curtailment on this basic right should be explicit, and this Court should be sure that it is. A review of this issue by this Court will insure the protection of all the citizens in Pennsylvania.

B. The Statute Is Discriminatory.

Even if the statute involved were not vague, it certainly is discriminatory. We submit that the Supreme Court of Pennsylvania completely misapplied and misconstrued the decisions of this Honorable Court relative to Sunday closing laws. We submit the decisions of this Court in *McGowan v. State of Maryland,* 366 U. S. 447, 81 S. Ct. 1101 (1961), and *Two Guys from Harrison-Allentown, Inc. v. McGinley,* 366 U. S. 582, 81 S. Ct. 1135 (1961), do not support the opinion in this case. The *Two Guys* case is particularly significant here as it involved a Sunday closing statute in Pennsylvania.

In the *Two Guys* case, this Court sustained the constitutional validity of a statute which prohibited the retail sale of approximately twenty specified commodities. However, in that case the prohibition was aimed at all retail stores which sold the listed items. It did not discriminate as does the statute in this case. This discrimination was recognized by Justice Roberts in his concurring opinion and Justice O'Brien in his dissent.

It is the position of the appellant in this case that the statute as enacted, constitutes special legislation and, denies appellant equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The statute here in question purports to prohibit the retail sale or otherwise dealing in fresh meats, produce or groceries on Sunday. However, in the same section it exempts any retail establishment:

(1) Employing less than ten persons;

(2) Where they are offered for sale by the proprietor or members of his immediate family or employing less than ten persons;

(3) Where food is prepared on the premises for human consumption.

> "A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special." Vol. 82, C. J. S., *Statutes,* Sec. 163, p. 277.
>
> "A special law is one which relates to particular persons or things or to particular persons or things of a class, or which operates on or over a portion of a class instead of all of the class." Vol. 82, C. J. S., *Statutes,* Sec. 165, p. 279.
>
> "Under a Constitutional provision prohibiting local or special laws, it is beyond the purview of the legislature, whatever its purpose, to limit the scope of a general law by a proviso that is inherently local and special in nature." Vol. 82, C. J. S., *Statutes,* Sec. 1555, p. 263.

We submit that this is exactly what has been done here. A statute general in nature was passed dealing with the *engaging in the business of retail sale and otherwise dealing in fresh meats, produce and groceries.* By creating

the exemption to the statute, the Legislature limited the scope of the general law. This limitation makes the statute special and in violation of the equal protection clause of the Constitution of the United States.

The Legislature has not made the statute applicable to all members of the class. It has exempted various members of the class without necessity therefor and the result is special legislation and a denial of equal protection.

Where is the manifest peculiarity distinguishing a grocery store employing nine persons from one employing ten persons, or from a store that could employ one hundred persons if the groceries could be said to have been offered for sale by the proprietor if he were on the premises?

Where does the necessity exist for distinguishing between a grocery where food is prepared on the premises and one that is not? A store could make, for example, potato salad, cole slaw and have a hot dog stand or a small snack bar. It would be exempt and could sell all the fresh meats, produce and groceries it wished. It could employ a thousand persons and still be exempt.

On the other hand, a similarly situated store with the exact number of employees but that did not prepare food on the premises would be in violation of the statute and would be subject to a fine of $100.00 for each quart of milk, for each loaf of bread, for each can of soup or each pound of potatoes it sold.

The senseless discrimination that this statute permits can be simply illustrated. For example, grocery store A employs nine people, whereas grocery store B employs ten people. Grocery store C employs 100 people, but prepares cole slaw, potato salad and broils hot dogs on the

premises. Grocery store D employs 100 people, but prepares no food on the premises.

Let us assume that in each store on a Sunday grocery A, B, C and D each sell one quart of milk, 6 cans of soup and a bottle of ketchup. Stores A and C could not be in violation of the statute, whereas stores B and D who sold the same items would be fined $600.00 each. If they had ten such sales, they would be fined $6,000.00.

Obviously, the statute grants an immunity to B and D while denying such a privilege to A and C. It treats persons similarly situated and in the same trade or business differently.

We submit that it is impossible to suggest a difference between a store that sells groceries, employs 100 persons and has a small counter where food is prepared and a store that sells groceries, employs 10 persons and does not prepare food. A statute which permits the former to operate on Sunday and forbids the latter cannot be based on any valid distinction. Since there is no valid difference there can be no classification.

Justice Roberts of the Supreme Court of Pennsylvania refused to join in the majority opinion. He recognized that there was senseless economic discrimination by this statute. He felt that the constitutional safeguards were offended because there was economic discrimination. In *McGowan v. State of Maryland*, 336 U. S. 423, 425, 81 S. Ct. 1101, 1105 (1961), this Court stated:

> "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the State's objective."

Justice Roberts pointed out that,

> "the language in *McGowan* requires the very *clearest* showing that economic discrimination will *further*

a legitimate state interest before this, or any other court, may countenance such discrimination in a Sunday Closing Law. Absent such a showing, the present case is indistinguishable from all those in which similar legislation has been struck down." 428 Pa. 20, 61 (1967).

There is another reason why this Court should consider the case. What we have is the Courts of many states recognizing that it is a violation of the Federal Constitution to discriminate between persons similarly situated. While the Courts of Pennsylvania would permit such economic discrimination.

An exhaustive annotation on this subject is found at 57 A. L. R. 2d 975, which at page 979 points out it is an annotation,

> "confined to cases dealing with the validity of discrimination in a Sunday law between different kinds of stores or different kinds of commodities."

The Courts in Illinois in *Mt. Vernon v. Julian,* 369 Ill. 447, 17 N. E. 2d 52, 55 (1938), and in *Pacesetter Homes, Inc. v. Village of South Holland, Illinois,* 118 Ill. 2d 247, 163 N. E. 2d 464 (1959), struck down discriminatory Sunday closing laws.

In *Broadbent v. Gibson,* 105 Utah 53, 140 P. 2d 939, the Utah Supreme Court pointed out that general Sunday closing laws are uniformly upheld and that,

> "* * * it is only upon special statutes or special exceptions to general so-called Sunday laws, that the constitutionality of such enactments is seriously called in question. The main questions to be decided, therefore, is whether or not the exceptions are unreasonable and arbitrary so as to unconstitutionally discriminate between persons similarly situated." *Broadbent v. Gibson,* 105 Utah 53, 140 P. 2d 939, 943.

A similar ruling was made in New Jersey. *Sarner v. Union Twp.,* 55 N. J. Super. 523, 151 A. 2d 208 (1959).

In Arkansas, an ordinance was enacted which prohibited the operation of any grocery store on Sunday which was staffed, maintained and/or operated by more than two persons, whether owners and one or more employees. The Court held that the ordinance was unconstitutional and void for it in effect permitted grocery stores employing less than two people to operate on Sunday. *City of Hot Springs v. Gray,* 215 Ark., 242, 219 S. W. 2d 930 (1949).

The statute most similar to the Pennsylvania statute may be found in Nebraska. There, the statute forbade the retail sale on Sunday of various commodities; however, it exempted sales at trade fairs and places of business employing not more than two employees. In *Terry Carpenter, Inc. v. Wood,* 177 Neb., 515, 129 N. W. 2d 475 (1964), the Supreme Court of Nebraska declared the statute to be invalid. It pointed out that the exemption in favor of trade shows and retailers employing less than two persons was an obvious discrimination. The Court there held:

> "The effect of this act is to close retail establishments with more than two employees on Sunday, and by so doing to force the general public to patronize two-employee establishments, which are favored by the act. So far as the general public is concerned, there will be no change in buying habits, merely a little inconvenience. The public may still shop on Sunday. It can still buy the same articles it has always bought on that day. The only difference is that in some instances it will be necessary to trade at different establishments than those patronized in the past. How this can promote the declared purpose of L. B. 710 is in the realm of speculative conjecture. We are unable to perceive how it can possibly be promotive of the health and welfare of the people of the State of Nebraska to prohibit the operation of retail outlets having more than two employees from Sunday activity while permitting those with two employees to operate as well as permitting the Sunday

employment of the rest of the population. This is an arbitrary, discriminatory classification which questions the declared purpose of the act." *Terry Carpenter, Inc. v. Wood*, 177 Neb., 155, 129 N. W. 475, 480 (1964).

In *Justeen's Food Stores v. City of Tulare*, 12 Cal. 2d 324, 84 P. 2d 140 (1938), discriminatory legislation was struck down. Similar conclusions were reached in *Deese v. City of Lodi*, 21 Cal. App. 2d 631, 69 P. 2d 1005 (1937); *Arrizo v. Lincoln*, 154 Neb., 537, 48 N. W. 2d 643 (1951); *Elliott v. State*, 29 Ariz., 839, 242 P. 340 (1926). The cases indicate that there must be a logical distinction between the stores ordered to be closed and those allowed to be open. If there is no logical distinction, the legislation is special and invalid.

Conclusion

The questions presented here are substantial since they deal with the sale of food that effect nearly every citizen of Pennsylvania. This Court should review this case and determine whether the Commonwealth of Pennsylvania has enacted a vague criminal statute and one which discriminates between persons similarly situated.

Respectfully submitted,

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APPENDIX A

Opinion of Court of Common Pleas of Beaver County, Pennsylvania Filed May 4, 1966

SCALERA, *P. J.* May 4, 1966

The plaintiff corporation, owner of a supermarket in Hopewell Township, Beaver County, Pennsylvania, filed a Complaint in Equity requesting a permanent injunction restraining the defendants from enforcing the Act of June 24, 1939, P. L. 872, Sec. 699.15, added September 27, 1961, P. L. 1965, Sec. 1, 18 P. S. 4699.15, which prohibits, with certain exceptions, the sale on Sunday of meat, produce and groceries.

The plaintiff had indicated its intention to open its supermarket on Sundays from 9:00 o'clock A. M. until 11:00 o'clock P. M. The District Attorney of Beaver County and the County Detectives advised the plaintiff that arrests would be made for violation of the Act, whereupon plaintiff filed a Complaint in Equity. Defendants filed an Answer. A hearing was held and testimony taken. A Stipulation was filed on January 6, 1966, in which the District Attorney agreed to permit certain amendments to plaintiff's Complaint. Suggested Findings of Fact and Conclusions of Law were filed by the plaintiff.

ISSUES.

1. Whether equity has jurisdiction.

2. Whether the statute is unconstitutional as being so vague and indefinite as to violate the Fourteenth Amendment of the Constitution of the United States.

3. Whether the statute is unconstitutional in that it violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and the special law prohibition of Article III, Sec. 7, of the Pennsylvania Constitution because the statute is not based upon real and substantial differences which are reasonably related to the purpose of the law.

4. Whether the plaintiff is exempt from the application of the statute.

FINDINGS OF FACT.

1. The plaintiff, Bertera's Hopewell Foodland, Inc., is a business corporation organized and existing under the laws of the Commonwealth of Pennsylvania and having its principal office at 3755 William Penn Highway in the Borough of Monroeville, Allegheny County, Pennsylvania, with all of its stock owned by three brothers of the Bertera family.

2. The defendants herein are the District Attorney of Beaver County, the Chief County Detective and County Detectives of Beaver County and "other municipal and state law enforcement officers, all members of a class."

3. The plaintiff is the owner and operator of a store under the name of Bertera's Foodland in Hopewell Township, Beaver County, Pennsylvania, where fresh meat, produce and groceries are sold at retail.

4. The plaintiff employs approximately sixty employees.

5. The plaintiff indicated its intention to operate its store from the hours 9:00 o'clock A. M. to 11:00 o'clock P. M. on Sundays.

6. The defendants, the District Attorney and the Detectives of Beaver County, notified the plaintiff and its officers

that if the store were open on Sundays and that if there were in excess of ten employees working on Sundays, that arrests and criminal prosecutions would be brought under the Act of June 24, 1939, P. L. 872, as amended.

7. The plaintiff has in its employment meat cutters, produce clerks and other employees who on the premises on Sundays are actively and steadily engaged in the slicing, cutting, dressing, trimming, cleaning and packaging of meats and produce for sale for human consumption.

DISCUSSION.

Plaintiff contends that the statute is unconstitutional as being so vague and indefinite as to provide the Fourteenth Amendment of the Constitution. Plaintiff next contends that the statute is unconstitutional in that it violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and the special law prohibition of Article III, Sec. 7, of the Pennsylvania Constitution because the statute is not based upon real and substantial differences which are reasonably related to the purpose of the law.

Plaintiff further contends that if the statute is constitutional, it is not in violation thereof because it is exempt under the statute as a retail establishment where food is prepared on the premises for human consumption.

Plaintiff also contends that a court of equity has jurisdiction to permanently enjoin public officials from enforcing a statute when the complainant asserts the unconstitutionality of the statute on its face and when the enforcement thereof would cause the complainant irreparable harm, grave interference with its business, multiplicity of arrests and exorbitant and cumulative penalties.

The statute provides that:

"Whoever engages in the business of selling or otherwise dealing at retail in fresh meats, produce and groceries on Sunday shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one (1) year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty (30) days in default thereof.

Each separate sale, or offer to sell, shall constitute a separate offense.

Informations charging violations of this section shall be brought within seventy-two (72) hours after the commission of the alleged offense and not thereafter.

This section shall not apply to any retail establishment employing less than ten persons or to any retail establishment where fresh meats, produce and groceries are offered or sold by the proprietor or members of his immediate family or employing less than ten persons nor shall it apply to any retail establishments where food is prepared on the premises for human consumption. 1939, June 24, P. L. 872, Sec. 699.15, added 1961, Sept. 27, P. L. 1695, Sec. 1." 18 P. S. 4699.15.

Initially we must consider whether this Court, sitting as a court of equity, has jurisdiction to entertain this action to restrain the enforcement of the statute.

In *Samuels et al. v. City of Beaver Falls*, 5 D. & C. 2d 500 (1955), at page 505, it was claimed that a city ordinance

prohibiting the growing of weeds on all real property and providing for a fine of $5.00 to $25.00 and in default of payment confinement up to ten days for each offense, was unconstitutional and would cause irreparable loss to the plaintiff's property and would subject the plaintiffs to cumulative and oppressive penalties pending judicial determination of the validity of the ordinance. The late President Judge Robert E. McCreary held in that case:

> "We were first concerned with the fact that plaintiffs were in the wrong court (equity) and that the validity of the ordinance could be tested only by plaintiffs subjecting themselves to arrest and raising the question of the reasonableness and constitutionality of the ordinance on appeal to the court of quarter sessions or by certiorari. But when we read what Mr. Chief Justice Stern said on the subject in the case of *Adams v. New Kensington*, 357 Pa. 557, we think it is abundantly clear that under the facts in the case we are considering plaintiffs had a right to proceed in equity. The chief justice there said, pp. 560, 561:
>
> 'It is elementary that an injunction will not be granted to restrain criminal prosecutions on the mere ground that the statute or ordinance on which the prosecution is based is, for any reason, unenforceable, since the party has an adequate remedy at law; he may establish at trial, by way of defense, the invalidity of the legislative enactment. But equity does have jurisdiction to enjoin such a prosecution where it is alleged not only that the statute or ordinance is unconstitutional and void but that its enforcement would cause the plaintiff irreparable loss to his property, either by effecting, if not a total suppression of his business, at least a grave interference therewith, or by subjecting him to the

> imposition of cumulative, exorbitant and oppressive penalties pending judicial determination of the validity of the legislation. In such cases, the ground of equitable jurisdiction is the protection of property rights, and the fact that a criminal proceeding is involved is merely incidental.' "

In *Harris-Walsh, Inc. v. Dickson City Boro,* 420 Pa. 259 (1966), the Supreme Court held that subjection to a criminal prosecution is not a remedy of such adequacy as to oust equity of jurisdiction in a case where the validity of an ordinance was attacked as being illegal, unlawful and unconstitutional.

The statute herein is attacked as being unconstitutional. The only remedy-providing section is that portion of the law which provides for penalties for its violation. The only fashion in which plaintiff can test its objections under the statute is to subject itself to a criminal prosecution. This is not an adequate remedy at law. Equity has jurisdiction.

We do not understand that the plaintiff contends, as the District Attorney apparently assumes, that the Act of 1939 is unconstitutional as a law respecting the establishment of religion. The Supreme Court of Pennsylvania in *Specht v. Commonwealth,* 8 Pa. 312, determining that the legislature's choice of Sunday as a day of rest from worldly employment, even if Sunday were chosen because of the religious convictions of the community, is not a violation of the third section of Article 9 of the Pennsylvania Constitution.

The Supreme Court of the United States in *McGowan v. State of Maryland,* 366 U. S. 420, 81 S. Ct. 1101 (1961), upheld Maryland Sunday Closing Laws, specifically ruling

that such laws do not violate the guarantee of separation of church and state as being laws respecting an establishment of religion contrary to the First Amendment of the United States Constitution made applicable to the States by the Fourteenth Amendment.

As Chief Justice Warren said in McGowan, *supra*, at page 1115:

> "Throughout this century and longer, both the federal and state governments have oriented their activities very largely toward improvement of the health, safety, recreation and general well-being of our citizens. Numerous laws affecting public health, safety factors in industry, laws affecting hours and condition of labor of women and children, week-end diversion at parks and beaches, and cultural activities of various kinds, now point the way toward the good life for all. Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State."

In *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U. S. 582, 81 S. Ct. 1135 (1961), the Supreme Court of the United States ruled that the Act of June 24, 1939,

P. L. 872, Sec. 699.10, added 1959, Aug. 10, P. L. 660, Sec. 1, 18 P. S. 4699.10, is not a law respecting the establishment of religion and therefore is not unconstitutional.

We also do not understand that plaintiff contends that the statute is unconstitutional as being an invalid exercise of the police power. The state may as an exercise of its police power set aside a day of rest and enact laws to compel the peace, order and quiet of Sunday as a day of rest. *McGowan v. State of Maryland, supra.*

Plaintiff contends that the statute is unconstitutionally vague and indefinite and argues in effect that it is necessary to guess at the statute's meaning in order to determine what conduct it makes criminal. In illustration of its proposition, plaintiff argues (1) that the statute fails to define the words "proprietor" and "members of his immediate family" and fails to state what they must do or not do concerning the store and its sales on Sunday, (2) that the statute fails to define the word "employing" and to clarify when a person will be deemed to be employed in a retail establishment, and (3) that the statute fails to state with particularity which person is subject to prosecution for a prohibited sale brought about by the component efforts of several or more persons.

Sunday Closing Laws in Pennsylvania and in other states often have been attacked on this basis. In *Commonwealth v. Bauder,* 28 Lehigh County, 20, 14 D. & C. 2d 571 (1958), the defendant argued the unconstitutional vagueness of Section 699.4 of the Criminal Code of June 24, 1939, P. L. 872, 18 P. S. 4699.4, which provides as follows:

> "Whoever does or performs any worldly employment or business whatsoever on the Lord's day, commonly called Sunday (works of necessity, charity and wholesome recreation excepted), shall, upon conviction

thereof in a summary proceeding, be sentenced to pay a fine of four dollars ($4), for the use of Commonwealth, or, in default of the payment thereof, shall suffer six (6) days' imprisonment.

As used in this section 'wholesome recreation' shall mean golf, tennis, boating, swimming, bowling, basketball, picnicking, shooting at inanimate targets and similar healthful or recreational exercises and activities.

Nothing herein contained shall be construed to prohibit the dressing of victuals in private families, bakehouses, lodging-houses, inns and other houses of entertainment for the use of so-journers, travellers or strangers, or to prohibit the sale of newspapers, or to hinder watermen from landing their passengers or ferrymen from carrying over the water travellers, or work in connection with the rendering of service by a public utility as defined by the act of May 28, 1937 (P. L. 1053), known as the 'Public Utility Law,' or persons removing with their families on the Lord's day, commonly called Sunday, nor to the delivery of milk or the necessaries of life, before nine of the clock in the forenoon, nor after five of the clock in the afternoon of the same day, nor shall anything herein contained be construed to prohibit the production and performance of drama and civic light opera in cities of the second class on Sundays, between the hours of two o'clock post meridian and twelve o'clock midnight, by nonprofit corporations in such cities, with right to charge admission, nor shall anything herein contained be construed to prohibit any person, partnership, association or corporation from conducting, staging, managing, operating, performing or engaging in bas-

ketball, ice shows and ice hockey in cities of the first and second class, on Sundays, between the hours of two o'clock post meridian and twelve o'clock midnight, although a charge of admission thereto is made and although labor or business is necessary to conduct, stage, manage or operate the same. The hours prescribed by this section shall be daylight saving time in any such city during such part of the year when daylight saving time may be observed generally in such city. 1939, June 24, P. L. 872, Sec. 699.4; 1959, Aug. 28, P. L. 777, Sec. 1; 1959, Nov. 19, P. L. 1530, No. 540, Sec. 1; 1959, Dec. 16, P. L. 1874, Sec. 2; 1961, July 6, P. L. 514, Sec. 1; 1961, July 10, P. L. 560, Sec. 1."

President Judge Henninger at page 578 rejected defendant's contention, citing *Comm. ex rel. v. American Baseball Club of Philadelphia*, 290 Pa. 136, wherein the Supreme Court stated at page 143:

"On appellant's second proposition that the act is unconstitutional for uncertainty, we think very little is required to be said. See 37 Cyc. 541; 12 C. J. 1275. It has been on the statute books for 133 years and has been the subject of much judicial consideration. When its language is given its ordinary not a strained construction, its meaning we think is plain. It may be that those who do not wish to understand or abide by its provisions find them uncertain; surely those who wish to follow the custom of our people in Sunday observance do not so find the interdictions of the statute. We can see no basis whatever for the argument that the act violates the 14th Amendment to the federal Constitution."

Similarly, in *McGowan v. Maryland, supra*, one of the propositions asserted by appellants was that Article 27,

Section 509, of the Maryland statute which exempted the Sunday retail sale of "merchandise essential to, or customarily sold at, or incidental to the operation of" bathing beaches, amusement parks, et cetera, in Anne Arundel County, was unconstitutionally vague. The Court said at page 1106 in rejecting appellant's argument:

> "We believe that business people of ordinary intelligence in the position of appellants' employer would be able to know what exceptions are encompassed by the statute either as a matter of ordinary commercial knowledge or by simply making a reasonable investigation at a nearby bathing beach or amusement park within the county."

Surely if language such as "worldly employment," "business," "works of necessity and charity," and language such as that used in the Maryland Act, are not unconstitutionally vague, then the more explicit and modern terminology of the statute here involved is not invalid for vagueness.

An examination of the statute against the background of Pennsylvania's prior Sunday Closing legislation indicates that the General Assembly has indeed clarified and made more specific much of what formerly was encompassed in much broader language. The legislature did not leave to the interpretation of the Courts the question of whether the retail sale of meats, produce and groceries was "worldly employment" but now specifically prohibits this activity and sets forth in plain language several exemptions.

In considering plaintiff's request that the statute be declared unconstitutionally vague, we must apply the general rules frequently declared as to Acts of Assembly or any parts thereof. Where unconstitutionality is clear, we may say so; where the statute's meaning is doubtful, we must

adopt that construction which renders the language valid. *Evans v. West Norriton Township Municipal Authority*, 370 Pa. 150, 87 A. 2d 474 (1952). *Fidelity-Philadelphia Trust Co. et al. v. Hines*, 337 Pa. 48, 10 A. 2d 553 (1940).

As stated in the Statutory Construction Act of May 28, 1937, P. L. 1019, Art. III, Sec. 33, 46 P. S. 533, "Words and phrases shall be construed according to rules of grammar and according to their common and approved usage. * * *" The words and phrases about the ambiguity of which plaintiff complains have common and approved meanings.

Section 51 of the Statutory Construction Act, May 28, 1937, P. L. 1019, Art. IV, 46 P. S. 551, further provides:

> "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the Legislature. Every law shall be construed, if possible, to give effect to all its provisions.
>
> When the words of a law are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.
>
> When the words of a law are not explicit, the intention of the Legislature may be ascertained by considering, among other matters—(1) the occasion and necessity for the law; (2) the circumstances under which it was enacted; (3) the mischief to be remedied; (4) the object to be attained; (5) the former law, if any, including other laws upon the same or similar subjects; (6) the consequences of a particular interpretation; (7) the contemporaneous legislative history; and (8) legislative and administrative interpretations of such law. 1937, May 28, P. L. 1019, Art. IV, Sec. 51."

Even accepting plaintiff's position that the words of the statute are not free of all ambiguity, in considering the

matters enumerated by the statutory construction act, we necessarily conclude that the legislature intended to prohibit retail sales of meats, produce and groceries on Sunday.

Furthermore, it is not incumbent on this Court in this proceeding to define each of the words and phrases of which plaintiff complains when no facts involving these words and phrases are before us. Thus it is not in evidence before us that the proprietor or members of his immediate family were engaged in the sale or offering for sale of products on Sunday. It is not in evidence that a person has been subjected to prosecution or threat of prosecution for a sale brought about by the component efforts of several or more persons. It is in evidence that plaintiff has approximately sixty employees and that thirty-five or forty work on Sunday. We shall try to determine the alleged ambiguities when the hypothetical cases exhaustively and imaginatively propounded by plaintiff in its brief are presented in actual litigation.

In evidence in this case, however, are facts alleged by the plaintiff, and admittedly by answer of the District Attorney, which plaintiff contends exempt plaintiff as a retail establishment where food is prepared on the premises for human consumption. Plaintiff first, of course, argues that this portion of the statute is also unconstitutionally vague because the statute fails to define the meaning of the words used.

In the stipulation of both parties filed on January 6, 1966, the plaintiff amended its Complaint to provide in Paragraph 5(a):

> "5. (a) That the plaintiff has in its employment meat cutters, produce clerks and other employees who, on the premises daily, including Sundays, are actively

and steadily engaged in the slicing, cutting, dressing, trimming, cleaning, and packaging otherwise preparing fresh meats and produce for sale for human consumption."

The District Attorney admitted this allegation.

It should be noted that the plaintiff's amendment is correctly quoted herein, including what appears to be an error of omission between the words "packaging" and "otherwise." Nevertheless it is clear from the amendment itself, from testimony and from the oral arguments and briefs that the facts are that employees of the plaintiff are engaged in slicing, cutting, dressing, trimming, cleaning and packaging meats and produce on the plaintiff's premises on Sunday.

In urging that this portion of the statute is unconstitutionally vague, plaintiff again advances a number of hypothetical questions. The plaintiff notes that the statute does not limit this exemption to restaurants or eating establishments and determines from this that the application of this portion of the statute depends on the meaning of the word "prepared."

The plaintiff then asks if the word "prepared" means "cooked." If this is so, plaintiff asks how much food must be cooked and if the cooking must be done steadily throughout the Sunday selling hours or only when a customer orders food. Plaintiff asks, do the words "for human consumption" mean edible food fit for human beings or do the words mean that the cooked food must be eaten on the premises. The plaintiff asks if the exemption is applicable if employees cook food for their own consumption. Finally the plaintiff questions whether the "popping of popcorn," eaten on or off the premises, qualifies an establishment for

the exemption, and if not, what quantity and quality of cooking does qualify a business for exemption.

We have referred to plaintiff's brief extensively in order to illustrate the nature of plaintiff's argument. Because this portion of the statute is before us for consideration by the evidence, we must consider plaintiff's argument that this portion of the statute is also unconstitutionally vague more extensively than other hypothetical questions of vagueness raised by plaintiff which are not in evidence before us.

But we must repeat here again our opinion that it is not incumbent on this Court to decide in the abstract the detailed meanings and possible interpretations of the law or portions thereof which are not fairly raised by the issues and evidence in this case. There is a very practical reason for this, and that is in attempting to determine every possible interpretation of the language used, we would be without the benefit of facts and argument of counsel based on hard facts. Thus, these questions of quantity and quality of cooked food, the hours of cooking and whether or not food is cooked for employees, must await the time when they are presented to this Court, when hopefully we shall have the benefit not only of facts but of counsel's research and reasoning in this area. It is sufficient to note that in this case the record is devoid of any evidence that food is cooked on the premises of plaintiff.

The statute does omit the words "in a restaurant or eating establishment." The plaintiff is correct in assuming, we believe, that the omission is deliberate. Even if it were not, we have no power to insert these words. We believe it is obvious that from the omission of these words and from an overall reading of the statute that the legislature intended to exempt from the prohibition a retail establish-

ment wherein groceries, etc., are sold and wherein food is prepared on the premises for human consumption.

We next consider the meaning of the words "on the premises." This indicates to us that the legislature by the use of these words is so limiting the word "prepared" to indicate that the food must be prepared on the premises as distinguished from an establishment where food is prepared elsewhere and delivered to the premises to be sold.

These words may be of particular significance in a case where the establishment serves sandwiches consisting of bread baked elsewhere and coldcuts cooked elsewhere and other foods cooked elsewhere and delivered to the establishment where they are served. But here again these facts are not in this case.

So far as the words "for human consumption" are concerned, these words may also be of particular significance in another case. Here they are not significant except as they aid in defining the word "prepared."

In this case, since in addition to asserting that this portion of the statute is vague, the plaintiff is also claiming the benefit of this exemption, if we find it not unconstitutionally vague, the question of the meaning of the word "prepared" is in issue and raised by the facts.

The plaintiff notes that Webster's Unabridged Dictionary, Second Edition, defines the word to mean "make ready" and in defining the word in conjunction with food to mean "get ready for eating, by due assembling, dressing or cooking." These citations are taken from plaintiff's brief.

Plaintiff cites the following cases in which plaintiff says the word "prepared" has been defined and the definition

in each case has excluded the process of cooking. Thus in *Thomas v. Winchester*, 6 N. Y. 397, the Court stated at page 411:

"* * * prepared must be understood as manufactured or processed as opposed to food in its original state."

In *L. & S. Delicatessen, Inc. v. Caravana*, 143 N. Y. S. 2d 350, the Court said at page 353 that coldcuts, including sausage, liverwurst and bologna were "prepared and cooked meat products."

Plaintiff further cites *U. S. v. Conkey and Company*, 12 C. C. P. A. 552, at 555, wherein the Court stated in referring to the word "prepared" that:

"In a general sense it implies that fresh or raw materials have undergone certain mechanical changes, such as cutting, slicing, grinding, mashing, mixing, etc., and usually implies that it has been advanced toward the condition in which it is used."

A case significant and interesting for its reasoning is *People v. Wolen*, 291 N. Y. S. 665 (1936), in which case the defendant was charged with the violation of a Sunday Law in that on Sunday he sold a can of tomato soup, a can of peas and a can of corn. The defendant operated a delicatessen store selling cooked meats such as corned beef, tongue, etc., in addition to canned foods. Nothing of what he sold was eaten on the premises. The complaint was dismissed for the reason that under the law, delicatessen dealers were permitted to sell "cooked and prepared foods" between the hours of 4:00 P. M. and 7:30 P. M. on Sundays and the three canned foods he sold came under that definition.

The Court said at pages 666, 667:

"(1) The testimony is clear that these foods are cooked at the cannery either before or after canning.

It is also evident that they are 'prepared' in the sense that the vegetables from which they derived their respective origins undergo various processes which it is unnecessary to describe here, and the resulting product is inclosed in cans. They are 'put into a state for use,' as Webster's Unabridged Dictionary (2nd Ed.) defines the word 'prepared'. In the form that the articles specified reached the purchaser's hands they were ready to be eaten, and it was not even essential that they be heated before being served. I therefore hold that they come within the definition of 'cooked and prepared foods.'

It may be true that when the Penal Law was amended in 1913, so as to permit such sales by delicatessen dealers at the hours stated, the art of preserving food in cans had not reached its present day state of development. Nowadays we have truck farm and barnyard, lake and sea, orchard and field, each giving from its bounteous store; skilled human hands and robot machines prepare the yield for human consumption, divide it into suitable portions, seal it in tight containers, and the feast is ready for the table. In a large percentage of metropolitan homes, particularly those in which the kitchen equipment consists chiefly of a can opener and a telephone, the Sunday evening meal is merely a matter of serving upon plates what has been obtaind from the delicatessen store a few minutes earlier. A complete dinner of many courses can be pried out of metal or glass containers. Nevertheless it cannot be said that in the year when the Legislature enacted the amendment it had in mind only such cooked and prepared foods as meats and fish not inclosed in containers. Even at that time victuals in fair variety, including soup, peas, and corn, were being sold

in cans, and the lawmaking body must have intended to include them in the phraseology employed."

In *Collingswood v. Boyer*, 59 N. J. S. 561, 158 A. 2d 227 (1960), the defendants sold one-half dozen doughnuts for off-premises consumption. They were charged with the violation of a municipal Sunday Law. Both the ordinance and the state Sunday Law contained the following phraseology:

"Nothing contained in this chapter (ordinance) shall be construed to prohibit the preparation and sale of drugs, meals, prepared foods * * *."

The Court ruled that the doughnuts were within the meaning of prepared food and said at page 231 "that the words 'prepared food' mean food fit for immediate consumption either on or off the premises where the sale is made."

In interpreting the word "prepared" we are obliged to examine the statute as a whole. "The object of all interpretation in construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions." Statutory Construction Act, *supra*.

Further, when the words of the law are not free of ambiguity, the Court is directed to consider certain matters in attempting to ascertain the legislature's intention, among them the purpose and objective of the law and the consequences of a particular interpretation. Statutory Construction Act, *supra*.

In addition, in determining the intention of the legislature, the Court is guided by the following presumptions, among others:

"(1) That the Legislature does not intend a result that is absurd, impossible of execution or unreasonable;

(2) That the Legislature intends the entire statute to be effective and certain."

Statutory Construction Act, *supra:* Sec. 52; 46 P. S. 552.

From the definitions of the word "prepared" cited herein, it is obvious that the word in itself is susceptible of different interpretations. It has been interpreted to mean any food not in its original state. This would include food which has undergone any change from its original state. This is the definition plaintiff would have us adopt.

On the other hand, the word has been interpreted to mean food which is ready to be consumed in the normal manner, in other words, ready for eating.

There is no doubt that the intention of the legislature was to prohibit the retail sale of meats, produce and groceries on Sunday with certain exceptions. If we accept the argument of the plaintiff that the cleaning, trimming, cutting, slicing, dressing and packaging of food qualify the plaintiff as an exempt business under that paragraph of the statute which exempts establishments where food is prepared on the premises for human consumption, we would so construe the statute as to nullify the entire law. There is probably very little, if anything, in the grocery store which has not been cleaned, trimmed or otherwise altered in some way from its original state. If plaintiff is correct, then this exemption of the statute exempts all, and the legislature has passed an absurd and useless act.

In considering the statute as a whole, and bearing in mind the rules of statutory construction, we must presume that the exemptory provision intends more than any altera-

tion of food beyond its original state. Necessarily we conclude that the word "prepared" as used in this statute means retail establishments where food is cooked on the premises for human consumption.

We therefore conclude that this portion of the statute, as indeed the entire statute, is not unconstitutionally vague. We further conclude that plaintiff is not exempt from the prohibition of the law as a retail establishment where food is prepared on the premises for human consumption.

Plaintiff also maintains that the penalty provision is unconstitutionally vague in that it provides for penalties for offenses only within a year and a day after the first conviction and leaves to speculation and conjecture the prosecution and penalty, if any, for offenses committed after such year and a day.

The language is specific. The penalty for the first offense is a fine of $100.00. The penalty for any subsequent offense committed within one year after conviction for the first offense is a fine not exceeding $200.00 or imprisonment not exceeding thirty days in default of payment. We assume that after one year from conviction of the first offense, the offender is again treated as a first offender. Plaintiff's contention that this section of the statute is vague is without merit.

The second constitutional issue raised by the plaintiff is that the statute violates the "Equal Protection" clause of the Fourteenth Amendment of the United States Constitution and the special law prohibition of Article III, Sec. 7, of the Pennsylvania Constitution, in that the statute is not based upon real and substantial differences which are reasonably related to the purpose of the statute.

The legislature has wide discretion to enact legislation which discriminates among different groups of citizens.

That a law is unequal in its treatment of citizens does not cause that law to be unconstitutional so long as the inequality rests on facts which reasonably justify the difference in impact. Furthermore, the legislature is presumed to have acted within their constitutional power if there exists factually any reasonable basis for inequality. *McGowan v. Maryland, supra.*

As the Supreme Court of the United States said in *Two Guys from Harrison-Allentown v. McGinley, supra,* at page 1140, in discussing the rationality of imposing a higher penalty for the Sunday sale of selected commodities:

> "It was within the power of the legislature to have concluded that these businesses were particularly disrupting the intended atmosphere of the day because of the great volume of motor traffic attracted, the danger of their competitors also opening on Sunday and their large number of employees. 'Evils in the same field may be of different dimensions and proportions, requiring different remedies. * * * Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.' * * * The legislature may select one phase of one field and apply a remedy there, neglecting the others.' *Williamson v. Lee Optical,* 348 U. S. 483, 489, 75 S. Ct. 461, 465, 99 L. Ed. 563."

As Judge Henninger in *Comm. v. Bauder, supra,* pointed out at page 580, in quoting *State of Ohio v. Kidd,* 167 Ohio 521, at page 526:

> "Sunday Observance laws are in force in most of the states, and generally certain activities have been excepted from their coverage. These Sunday laws are sustained quite uniformly upon the theory that the selection of subjects for exemption is peculiarly a mat-

ter of legislative discretion. Fundamentally, discrimination is the very essence of classification and is not objectionable unless founded on distinctions which the courts are compelled to pronounce unreasonable or purely fictitious."

The plaintiff specifically contends that the statute is unconstitutional because it discriminates improperly among and between persons engaged in the same business, the retail sale of foods, meats and produce.

The three exemptions in the statute are (1) any retail establishment employing less than ten persons, (2) any retail establishment where the products are offered or sold by the proprietor or members of his immediate family or employing less than ten persons, and (3) any retail establishment where food is prepared on the premises for human consumption.

The first exemption discriminates between businesses employing less than ten and ten or more employees. The legislature has the power to classify according to the number of employees and to distinguish between businesses on this basis. *Durkin v. Kingston Coal Co.*, 171 Pa. 193, 33 A. 237 (1895). *Haverford Township et al. v. Siegel et al.*, 346 Pa. 1, 28 A. 2d 786 (1942).

The *Durkin* case involved legislation regulating coal mines which exempted from the regulation mines employing ten or less employees. The *Haverford* case provided for a police civil service commission but applied the legislation to municipalities with three or more paid police officers. In both cases the reasoning of the Court in upholding the constitutionality of the legislation was that the legislature has the right in regulating a particular class to exclude certain members of the class to whom the act can

have no useful application and upon whom, because of size the application of the legislation would be unnecessary and burdensome, considering the purpose of the particular legislation.

That size as measured by the number of employees is a reasonable basis for distinction in regulation cannot be disputed. Many consequences derive from size. It is reasonable to assume that larger stores are particularly disruptive to the legislative objective of maintaining Sunday as a day of rest, because of the larger number of employees and customers which the larger enterprise affects, because of the greater volume of motor traffic attracted to the store with the possibly greater need of police to direct such traffic, and because of the potential danger of competitors also opening on Sunday, which competitors might not be so enticed by the competition of a smaller enterprise.

The second exemption of the statute distinguishes between businesses on the basis of active participation of a proprietor or members of his immediate family. There is precedent for the legislature's power to classify according to ownership of a business. In *Equitable v. Geiger,* 342 Pa. 445, 21 A. 2d 53 (1941), the Supreme Court declared that consumer discount legislation is not unconstitutional because it excluded partnerships from the regulation involved. In *Commonwealth v. McDermott,* 296 Pa. 299, 145 A. 858 (1929), the Supreme Court ruled that the legislature could constitutionally exclude from its legislation requiring the registration of persons and organizations appealing to the public for funds other organizations engaged in the same type of appeal. As the Court in *McDermott, supra,* said at page 304.

> "The right of the legislature to enact laws containing exemptions has been so long established in this and other jurisdictions that we do not deem it neces-

> sary to refer to authorities here, only repeating what this court has often said, that there must be sound reason and real necessity for the exemptions."

And at pages 305 and 306 the Court quoted from *Commonwealth v. Grossman*, 248 Pa. 11, 15, that:

> "We have sustained classification as the proper exercise of legislative power, and held that it is a legislative question with which the Courts will not interfere, if made in good faith and based on genuine and substantial distinction of the subjects classified. * * *"

Here, as in the situation of the exemption of business with less than ten employees, the legislature undoubtedly determined that establishments wherein the proprietor or members of his immediate family were offering or selling the products do not so affect the purpose of the Sunday Law as to warrant the law's application. Certainly it is clear that in businesses covered by this exemption other employees would presumably be given their day of rest. The legislature may also have considered that such an establishment is traditionally the small corner grocery and that application of the law to such businesses imposes an unreasonable burden upon them as well as an unnecessary burden upon those concerned with the enforcement of the law considering particularly the slight impact such a business has upon the observance of Sunday as compared to the disruption of Sunday caused by other types of establishments.

The third exemption is of establishments wherein prepared foods are purveyed. Here it would seem that the legislature could reasonably find that the Sunday sale of prepared food is necessary for the health of the citizenry or for the furtherance of the recreational atmosphere of the day in that persons may prefer to avoid the burden of preparing meals on Sunday and instead purchase their

sustenance at the store or that travelers may find it convenient to be able to purchase their meals at the market.

The record is barren of any indication that an apparently reasonable basis for the legislature's exemptions in each instance does not exist. Nor does the record indicate in any way that the statutory distinctions are invidious. We find that the statute is not unconstitutionally discriminatory.

CONCLUSIONS OF LAW.

1. Equity has jurisdiction.

2. The statute is not unconstitutionally vague and indefinite.

3. The statute is not unconstitutional as violating the equal protection and special law constitutional provisions.

4. The plaintiff is not exempt from the application of the statute.

DECREE *NISI*.

And now, to-wit, May 4, 1966, it is ordered, adjudged and decreed

That an injunction enjoining the defendants from enforcing the Act of June 24, 1939, P. L. 872, Sec. 699.15, added September 27, 1961, P. L. 1695, Sec. 1, is denied;

And that the costs are to be paid by the plaintiff.

This Decree shall become final unless exceptions are filed thereto within twenty (20) days of the date of notice thereof to the parties by the Prothonotary.

BY THE COURT:

RALPH F. SCALERA,
P. J.

By the Court
May 4 1 28 PM '66
RALPH F. SCALERA
President Judge

Counsel of Record Notified May 4, 1966.

APPENDIX B

Opinion of Court of Common Pleas of Beaver County, Pennsylvania Filed July 27, 1966

SCALERA, *P. J.*

The plaintiff filed Exceptions on May 18, 1966 to the Decree of this Court dated May 4, 1966, denying plaintiff's request that the defendants be permanently enjoined from enforcing the Act of June 24, 1939, P. L. 872, Sec. 199.15, added September 27, 1961, P. L. 1695, Sec. 1; 18 P. S. 4699.15.

Oral argument was scheduled before the Court *en banc* on June 13, 1966 at 9:15 o'clock A. M. Counsel for the plaintiff with the concurrence of the District Attorney requested that argument be rescheduled. The request was granted. The plaintiff submitted a brief and oral argument was held before the Court *en banc* on July 5, 1966 at 1:30 o'clock P. M. The District Attorney relied on his brief submitted to the Court on the original issue.

Plaintiff's Exceptions are twelve in number. Exceptions numbered 1 through 4 aver that the Court erred in arriving at certain conclusions of law. The issues raised by these exceptions were determined in this Court's Opin-

ion and Order dated May 4, 1966. Having carefully reviewed these matters again, we dismiss the exceptions for the same reasons outlined in our Opinion of May 4, 1966.

Exceptions numbered 5 and 6 complain of the Court's failure to grant plaintiff's request for permanent injunction. These exceptions relate to all of the issues in the case and again we adopt our Opinion dated May 4, 1966 in dismissing Exceptions numbered 5 and 6.

Exceptions numbered 7, 8, 9, 10, 11 and 12 complain of the Court's failure to make certain findings of fact. Rule of Civil Procedure 1519(b) provides in part that:

> "* * * An exception which avers a failure to make substantial disposition of a request for a finding of fact must be answered specifically by finding as requested, by refusing so to find or by disqualifying the requested finding and not by simple dismissal of the exception."

Although we believe that our Opinion dated May 4, 1966 dealt with Exceptions numbered 7, 8, 9, 10, 11 and 12, either in explicit terms or if not explictly certainly by necessary implication, we shall consider each of the plaintiff's exceptions concerning factual matters separately.

Exception number 7 objects to the Court's failure, * * * "to find as a fact that the plaintiff has an investment of $350,000.00 in its store which was made in the expectation of being able to operate said store from the hours of 9:00 o'clock A. M. to 11:00 o'clock P. M. daily, including Sunday."

So far as the amount of the investment is concerned, the only pertinent testimony is as follows:

> "Q. * * * Can you give a rough estimate as to the total investment in that store including fixtures and also inventory?

A. I don't have my notes in front of me so I'll have to remember the best I can.

Q. Do you want your notes here?

A. Well, I would say we have about a $350,000.00 investment in this store in Hopewell."

The question asks for a rough estimate. The question asks for an investment including inventory. The witness states that he will have to remember the best he can and reluctantly the witness finally gives an approximation. It should be noted that inventory is usually a highly variable figure and if it is not, no effort was made to explain the nature of the inventory of this store, and whether or not their inventory remains constant. It should also be noted that none of the type of testimony customarily presented to prove capital investment, such as books and records of capital investment, data concerning contract prices of the construction of the building, contract prices of the construction of fixtures and/or invoices concerning the sale price of fixtures and the sale price of the land and other like evidence, was given to the Court, although corporations normally have this type of data regularly and easily available for assessment purposes and tax purposes.

This Court is unwilling to state on the basis of the evidence presented and its ambiguous nature a finding of fact that the investment in this store was $350,000.00.

Exception number 7 also states that the investment was made "in the expectation of being able to operate said store from the hours of 9:00 o'clock A. M. to 11:00 o'clock P. M. daily, including Sundays." It should first be noted, of course, that the exception is to the Court's failure to find as fact that the plaintiff has a specific named investment in the store, which investment was made in the expectation of being able to operate on Sunday. Therefore, it is our

conclusion that when we are unable to find as a matter of fact the amount of the dollar investment, the balance of plaintiff's exception falls also since it was predicated upon our finding as a fact the specific named dollar investment.

It also should be noted that plaintiff's complaint states in Paragraph 5, "That the plaintiff has a large investment in its store which was made in the expectation of being able to operate said store from the hours of 9:00 o'clock A. M. to 11:00 o'clock P. M. daily, including Sunday." The District Attorney's answer in Paragraph 5 states, "That the allegations contained in Paragraph 5 of the complaint are admitted." However, when plaintiff made his requested finding of fact and his Exception number 7, he did not state only that there was a large investment made but rather that an investment of $350,000.00 was made.

Thirdly, it should be noted that whether or not there was an expectation of opening on Sunday is a highly subjective matter and indeed it can be questioned whether any Court can find as a matter of fact that there was an expectation to violate the law.

Nevertheless, in reviewing the testimony as to whether or not there was an expectation or rather an investment made predicated on that expectation, the best the plaintiff has proven is that there was a hope on the part of the plaintiff that they would be able to operate their store on Sunday without any issue being raised of a violation of the law. That this is true is indicated by the following testimony:

> "Judge Scalera: Pardon me, Mr. Bertera, I have a question. During the direct examination by Mr. Conte you mentioned the fact that you had obtained a public relations man who had come to Beaver County and in working with the newspapers had worked out

something which led you to believe that no opposition would develop to Sunday sales. Is that a correct phrasing of your statements?

The Witness: It wasn't meant in that direction. When we come into here, we stated that we were going to—He stated in our behalf that we were going to be open seven days a week. He worked with the newspaper to set up how we were going to open this store, who we were going to invite to the opening and so forth and so on, and it's the only place we knew and where we were advised to go by the head office of the Foodland people to get as much information we needed to open this store and state our operating habits and so that the people would know what we were coming into the area with. He had come in here first exactly five weeks and one day prior to the opening is when he started to work because we opened on a Tuesday. He started Monday here on this program to get everything ready for this opening.

Judge Scalera: Well, I gathered from your newspapers working with the—from your public relations man working with the newspapers you felt or he felt that you could be opened on Sundays?

The Witness: Well, we not only—The idea only wasn't for that which hadn't come too much to our mind. The idea was that any opposition for any idea we would have for this store would come out in the open and we would know what it is and if we had any problems. That's about the answer to it, other than getting the thing starting to go.

Judge Scalera: Well, I thought—

The Witness: Well, its phrased back that they did not establish that we would be open because nobody

has that right to be established at that point. All we were doing is establishing that we would be open. What I meant by that is that everybody knew we would be opened seven days a week; that it was our policy from the first day we come in. In other words, it was our thought to be opened seven days and to hire local people, and there's many things involved there to hire everybody local except possibly the manager, but we even ended up with a local manager. That was the idea for the public relations man to let out what policies we were going to institute in putting this thing together and bringing it into the city. That's what I meant by that, Judge.

RE-DIRECT EXAMINATION by Mr. Conte:

Q. In other words, what you are stating is that in our policy of opening up seven days a week and operating this store you felt there would be such a need in this area that there would not be any conflict?

A. That's right; and if we were to have conflict, it's always best to know it before you get started.

Mr. Conte: That's the conclusion of our testimony.

Judge Sohn: May I ask one question, Mr. Bertera. From what you have now said I assume that there was no specific poll or inquiry taken in the community relative to whether or not there would be an approval of being opened on Sundays?

The Witness: Whether there would not be—

Judge Sohn: There was no specific investigation made with relation to that one problem?

The Witness: No. The specific relation was made that everything in general that it would take to make this business operate for a profit.

Judge Sohn: That's all I have.

RE-CROSS EXAMINATION by Mr. Masters:

Q. When you opened this store, did you open it with the intention to open on Sundays?

A. Yes.

Q. When did you open this store—Do you remember—July of '65?

A. No, we opened this in April.

Q. April of this year?

A. Yeah.

Q. When was the first Sunday you opened?

A. The store was opened in April. Now, the Sunday was—whatever Sunday following when we come in here to get an injunction prior to this—How would—you state this?

Q. We were here in July.

A. Well, the following Sunday we opened.

Q. Why didn't you open anytime from April until July?

A. Well, you come in and you sent your people in to tell us we couldn't open on Sunday, and we just didn't open it on Sunday, and we kept preparing to—I got Mr. Conte here to represent us to see why and to go forth with this thing until we come into Court. What else can I say?

Mr. Masters: That's all.

Judge Sohn: I want to get one thing cleared up here for my satisfaction. Are you saying that while your store opened in April, you didn't open on Sunday until July, the middle of July approximately?

The Witness: Well, let me state—

Judge Sohn: Wait until I ask the question. The question is have you been informed by the District Attorney or his representatives between April and July that there would be opposition to your store operating

on Sunday? When were you first informed of any perspective opposition?

The Witness: Yes to your first question; and to when, we were prepared to open the first Sunday—

Judge Sohn: No, that's not the question. My question is when were you informed that someone would oppose Sunday operations?

The Witness: The day we opened or the next day which was a Tuesday or a Wednesday. See, I can't remember the exact dates.

Judge Sohn: That's your answer?

The Witness: The day we opened or the next day the District Attorney sent men to the store stating that to my knowledge—I wasn't there. My brother took this message, and it came to me exactly the way it was; that if we opened that first Sunday, we would be liable to go to jail and to a hundred dollar fine.

Judge Sohn: All right, that's the answer."

In summary we refuse to find that the plaintiff in fact made an investment of $350,000.00 in its store in the expectation of operating its store on Sundays.

Exception number 8 objects to the Court's failure to find as a fact * * * "that the plaintiff must utilize to a maximum its fixtures, merchandise, fresh meats and produce with only minimum waste to offset the fixed costs in its establishment." This proposed finding of fact is in reality an axiom or economic proposition. The testimony which we assume was offered to support this proposed finding of fact was general testimony to the effect that businesses must operate in such a fashion as to be profitable. Nothing was introduced to show that in any particular way this store had to operate in any special fashion relevant to the issue in this case. We decline to find as a finding of fact what plaintiff requested in Exception number 8.

Exception number 9 objects to the Court's failure to find as a fact, • • • "that the plaintiff must realize an operational two percent of the gross sales as the necessary minimum profit margin for the purpose of continuing in business." The testimony concerning this matter was as follows:

"Q. Mr. Berterá, if it is not a secret, can you tell us on what percentage of profit do you operate? In other words, on the gross sales as to the net profits.

A. I'm going to say about two percent."

We decline to find as fact this proposition in view of the nature of the testimony which was an approximation and in view of this failure to produce the usually available testimony as to this matter, such as books and records.

Exception number 10 objects to the failure of the Court to find as a fact, • • • "That to enable the plaintiff to accomplish its necessary goals it must depend on Sunday sales from which plaintiff derives fourteen percent to twenty percent of its gross volume of business." It should first be noted that necessary goals are not defined and we must assume that by necessary goals the plaintiff refers to a certain preconceived profit margin. We should not have to assume that fact. The testimony concerning the Sunday sales is as follows:

"Q. What percentage of sales did you expect by Sunday returns? Your Sunday sales—What percentage as to your total sales did you expect?

A. Well, our Sunday sales will run fifteen percent or twenty percent of our total sales, and that's what we expected. Fifteen percent at least.

Q. And you have a history of that in other stores?

A. Yes."

So far as this matter of the other stores is concerned, the plaintiff's chief witness testified that he is an officer and director of two other stores, one located in Wilkinsburg and one in McKeesport. The testimony is as follows:

"A. Square footage—Well, McKeesport is the largest in volume. I think Hopewell is slightly—we are talking of a matter of about a thousand feet or so larger in size. They are both comparable to about the same. McKeesport—The construction started on it yesterday, and it will be approximately the same size. They are all in the category about being the same size now.

Q. Well, approximately what is the sizes?

A. Fifteen, sixteen thousand feet.

Q. You mean square feet?

A. Square feet.

Q. Now, before we move to the issue in Beaver County, are your other two stores in Allegheny County operating on Sundays?

A. One is operating on Sunday, and the other one will start operations on Sunday as soon as the improvements and rebuilding is finished. The one in Oakmont that we just sold, it does operate on Sunday. Now, we no longer own that one, but the same officers were involved in that one. We just sold that one. We sold that one just right before this come up.

Q. Do I understand that prior to this remodeling that you are undergoing in the McKeesport office, both stores were opened on Sunday?

A. That's right.

Q. How long were they opened on Sunday?

A. Since we started.

Q. Well, when?

A. Which one do you mean, the one in McKeesport?

Q. Each store.

A. Well, the one in McKeesport has been opened since July of 1962. The one in Wilkinsburg opened and was opened when we first opened it for a quite a few years in '39 I would say until '40, '41, '42. I would be afraid to pin myself right down without better knowledge of it, but it was opened a few years when we first opened that store. Due to not being feasible to keeping it open, we closed it on Sundays. Now, on this new moderization and expansion it is going to be open again."

This Court is not certain from this testimony whether or not other stores were open on Sunday and how long and whether the McKeesport store was a similar store to the Hopewell store, and so on. This testimony incidentally is illustrative of the ambiguous nature of much of the testimony offered. In addition plaintiff again failed to produce the sort of testimony easily available from the records of a corporation. We refuse to find as a finding of fact the proposition set forth in Exception number 10.

Exception number 11 objects to the Court's failure to find as a fact, * * * "that the plaintiff's store is family owned and operated and thus exempted from the provisions of the questioned statute." The first finding of fact in our Opinion and Order of May 4, 1966 was that the plaintiff is a corporation with all of its stock owned by three brothers of the Bertera family. This factually is the only finding we can make. What plaintiff proposes by Exception number 11 is not a finding of fact but rather a conclusion of law, which is discussed and determined in our opinion of May 4, 1966. We refuse to find as a fact the proposition advanced in Exception number 11.

Exception number 12 objects to the Court's failure to find as a fact, * * * "that the work of meat cutters, produce

clerks and other employees engaged in slicing, cutting, dressing, trimming, cleaning, etc., fresh meats and produce in the store is an act of preparing food on the premises for human consumption." In finding of fact number 7 of our Opinion and Order of May 4, 1966, we stated, "The plaintiff has in its employment meat cutters, produce clerks and other employees who on the premises on Sundays are actively and steadily engaged in the slicing, cutting, dressing, trimming, cleaning and packaging of meats and produce for sale for human consumption." What plaintiff proposes in its Exception number 12 is not in this case a finding of fact but rather again a conclusion of law and that conclusion involves the question of whether or not the activities described, such as slicing, cutting, etc., are under the statute the preparation of food on the premises for human consumption. That conclusion is discussed in our Opinion dated May 4, 1966 and determined therein. We refuse therefore to make the finding of fact requested in Exception number 12.

Much of what plaintiff advances in its Exceptions numbered 7 through 12 involve mixed conclusions of law and fact and we have discussed many of these propositions, if not all of them, in our Opinion of May 4, 1966, which we adopt herein. In addition much of what plaintiff requests in its exceptions are axioms or general propositions not pertinent to the issue in this case. We believe that the findings of fact we made in our Opinion of May 4, 1966 are those warranted by the evidence and pertinent to the issue in this case.

ORDER.

Now, to-wit, this 27th day of July, 1966, it is ordered and directed that plaintiff's Exceptions are dismissed and

the Opinion and Order of this Court dated May 4, 1966 is affirmed.

BY THE COURT,

RALPH F. SCALERA,
P. J.

I concur:

FRANK E. REED,
Specially Presiding,
P. J.

JAMES E. ROWLEY,
J.

APPENDIX C

Opinions of the Supreme Court of Pennsylvania Dated November 28, 1967

Appendix C-1

OPINION OF THE COURT

MUSMANNO, *J.* Filed: November 28, 1967

The plaintiff, Bertera's Hopewell Foodland, Inc., owns a supermarket in Hopewell Township, Beaver County, which, at the beginning of this litigation, employed 60 persons, 40 of whom worked in the establishment on Sundays. The District Attorney of Beaver County, Robert J. Masters, informed Bertera's Foodland that if it continued to operate on Sunday, he would prosecute under the "Sunday Closing Laws" of June 24, 1939, P. L. 872, Sec. 699.15, amended September 27, 1961, P. L. 1695, Sec. 1, 18 P. S. 4699.15,

which prohibits, with certain exceptions, the sale on Sunday of meat, produce and groceries.

The plaintiff refused to cease Sunday operation, claiming that the Amendment of 1961, above cited, was unconstitutional in that it violated the 14th Amendment to the Constitution of the United States and Article III, Sec. 7 of the Pennsylvania Constitution, averring it to be vague, indefinite, failed in equal protection and was not based on real and substantial differences which are reasonably related to the purpose of the law. The plaintiff went into the Court of Common Pleas of Beaver County to seek an injunction restraining the District Attorney and other law prosecuting officers in the county, from enforcing the statute in question.

The lower Court held that the statute was constitutional, the injunction was denied and the Complaint dismissed. The plaintiff appealed.

We are satisfied that Equity has jurisdiction. (*Adams v. New Kensington,* 357 Pa. 557; *Harris-Walsh, Inc. v. Dickson City Boro,* 420 Pa. 259).

The Act of September 27, 1961, P. L. 1965, provides that:

> "Whoever engages in the business of selling or otherwise dealing at retail in fresh meats, produce and groceries on Sunday shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one (1) year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding (30) days in default thereof."

This Act is one of the many postscripts to the original Pennsylvania Sunday Closing Law enacted in the earliest days of the Commonwealth, that is, the Act of April 22, 1794, 3 Sm. L. 177, and which merged into the now parent act of June 24, 1939, P. L. 872. From time to time the original Act of 1794 has been amended to allow wholesome entertainment and recreation on Sunday.* Its original strict provisions were also relaxed so as to permit the operation of certain businesses reasonably necessary for the comfort and convenience of the people, without detracting from the nature of Sunday, which was, and still remains, dedicated to the three R's: Religion, Rest and Recreation.

Obviously there could not be much rest or recreation for a person on Sunday if he could not obtain food on that day. While, of course, everybody should foresee on Saturday that he would need to eat on Sunday, and therefore should lay in a supply of provisions for the morrow, yet circumstances could prevent a realization of that anticipation and one should not be subjected to the hardship of fasting when, without any defilement of the pure Sabbath atmosphere, he could still obtain the required provender to sustain him over the weekend. Accordingly, the Legislature, in the Act of 1961, declared that:

> "This section shall not apply to any retail establishment employing less than ten persons or to any retail establishment where fresh meats, produce and groceries are offered or sold by the proprietor or members of his immediate family or employing less than ten persons nor shall it apply to any retail establishment where food is prepared on the premises for human consumption."

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* The writer of this Opinion spearheaded in the 1939 General Assembly the legislative campaign which resulted in the legalization of professional Sunday baseball and motion pictures.

We thus have three exceptions to the application of the Act, which, for convenience in discussion, we will number (1) where the store employs no more than 9 persons; (2) where the store is owned and run by a person and members of his immediate family (or employs no more than 9 persons); (3) where the establishment prepares food on its premises for eating purposes.

The plaintiff argues at length that a statute so vague that men of common intelligence must guess at its meaning violates due process. It wheels into play a battery of decisions to support this position—all so unnecessarily. Obviously, if a statute is printed in Chinese or is proclaimed in such badly expressed English that one cannot learn from it what is permitted and what is prohibited, it cannot be enforced. Instead of emphasizing the obvious, the plaintiff should show wherein the statute is vague. It attempts to do this by aiming its artillery of argumentation against the three exceptions in the Act, but its aiming is faulty because it does not set its sights in accordance with the criteria laid down in the Statutory Construction Act (May 28, 1937, P. L. 1019, Art. IV, 46 P. S. 551), which declares that in interpreting a law one must take into consideration, *inter alia*,

"(1) the occasion and necessity for the law;
(2) the circumstances under which it was enacted;
(3) the mischief to be remedied;
(4) the object to be attained;
(5) the former law, if any, including other laws upon the same or similar subjects;
(6) the consequences of a particular interpretation;
(7) the contemporaneous legislative history . . . ."

The plaintiff in its analysis and interpretation of the law of 1961 does not discuss the "occasion and necessity for

the law", it says nothing about "the object to be attained," it wholly ignores the "former law" and those "other laws upon the same or similar subjects." The plaintiff treats the law of 1961 as an entity wholly isolated from any other legislation, but the enactment of 1961, to begin with, is but an amendment to another law. It is a branch grafted to the original tree, and who can determine the nature of the resulting fruit without studying the trunk and the roots of the original plant? The Act of 1961, as already stated, is an amendment of the Act of 1939, which is but a descendant of the original Act of 1794, which declared that:

> "If any person shall do or perform any worldly employment or business whatsoever on the Lord's day, commonly called Sunday, works of necessity and charity only excepted, or shall use or practice any unlawful game, hunting, shooting, sport, or diversion whatsoever, on the same day, and be convicted thereof, every such person, so offending, shall for every such offense, forfeit and pay four dollars, to be levied by distress; or in case he or she shall refuse or neglect to pay the said sum, or goods and chattels cannot be found whereof to levy the same distress, he or she shall suffer six days' imprisonment in the house of correction of the proper county: Provided, always, that nothing herein contained shall be construed to prohibit the dressing of victuals in private families, bakehouses, lodging-houses, inns, and other houses of entertainment, for the use of sojourners, travellers, or strangers, or to hinder watermen from landing their passengers, or ferrymen from carrying over the water travellers or persons removing with their families on the Lord's day, commonly called Sunday, nor to the delivery of milk or the necessaries of life before nine of

the clock in the forenoon, nor after five of the clock in the afternoon, of the same day."

This Act of 1794 itself traces an ancestry back to the Ten Commandments fulminated from the smoking top of Mt. Sinai, proclaiming in the Fourth provision thereof:

"Remember the Sabbath day to keep it holy; six days shalt thou labor and do all thy work; but the seventh day is the Sabbath of the Lord thy God. In it thou shalt not do any work."

This devine pronouncement became part of the Common Law inherited by the thirteen American colonies and by the sovereign States of the American union. William Blackstone, in his immortal Commentaries, declared:

"The keeping one day in seven holy, as a time of relaxation and refreshment, as well as for public worship, is of admirable service to a state, considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of all classes, which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit. It enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness; it imprints on the minds of the people that sense of their duty to God so necessary to make them good citizens, but which yet would be worn out and defaced by an unremitted continuance of labor, without any stated times of recalling them to the worship of their Maker" (4 Bl. Comm. 63).

Before William Penn left England for the sylvania, of which he was proprietor, he and his fellow-Quakers adopted on May 5, 1682, a code of laws, the 36th of which reads:

"That according to the good example of primitive Christians, and for the ease of creation, every first

day of week, called Sunday, people shall abstain from their common daily labor, that they may better dispose themselves to worship God according to their understanding."

The first law enacted by the Quakers (December 7, 1682), after forming a government which was to become the Commonwealth of Pennsylvania, declared that "people shall abstain from their usual and common toil and labor" on Sunday. The law, in varying language, was reenacted in 1705, 1779, and 1786. Then, when the ink on the Constitution of the United States had but recently dried, the General Assembly on April 22, 1794 enacted the parent Sunday law which still controls in Pennsylvania.

From time to time, as already indicated, there have been modifications of the Act of 1794, in order to allow the people of Pennsylvania increased opportunity for revitalizing their spiritual and physical forces, but the Legislature has never deviated from the principle that Sunday is a day dedicated to religion, rest and recreation, and that its sanctified atmosphere must not be defiled through crass commercialization. The objectives of the Act of 1794 were to secure:

> "the observance of a day of rest for the community, thereby enabling every one to worship according to the dictates of his conscience, without distraction, and without disturbance, and thus giving a check to vice and immorality." (*Sparhawk v. Union Passenger Ry. Co.*, 54 Pa. 401, 409.)

Leaving aside for the moment the right to rest on Sunday which is indisputable, setting apart for the moment the right to recreation, which is equally not to be questioned, the right of a citizen of the Commonwealth to be free of distracting noises, and commotion arising from industrial

and commercial pursuits, which could disturb his worshipping, is protected by the law of 1794 and all its amendments. As churchgoers have the right to be saved from the firing of cannon or the beating of drums outside their houses of worship on Sunday, so also are householders protected under the laws of the Commonwealth from turbulences generated by excessive population movement attendant on business enterprises not falling within the exceptions listed in the Sunday Closing Laws. All the legislation on this subject departs from the premise that Sunday is a day different from the other days. The plaintiff nowhere in its argument seems to recognize this basic fact, without which debate on the law of 1961 is only empty sound.

Justice Woodward in the case of *Johnson v. Com.*, 22 Pa. 102, illluminated the subject with juridical eloquence when he said:

> "It would be a small boon to the people of Pennsylvania to declare their indefeasible right to worship God according to the dictates of their conscience, amid the din and confusion of secular employments and with desecrations on every hand of what they conscientiously believe to be hallowed time. These statutes were not designed to compel men to go to church or to worship God in any manner inconsistent with personal preferences, but to compel a cessation of those employments which are calculated to interfere with the rights of those who chose to assemble for public worship. The day was set apart for a purpose, and the penal enactments guard it, but they leave every man free to use it for the purpose or not. If he wish to use it for the purpose designed, the law protects him from the annoyance of others; if he do not, it restrains him from annoying those who do use it."

There is no merit to the contention that Sunday closing laws impinge on the First Amendment to the U. S. Constitution which prohibits the "establishment of religion," because, inseparably associated with that proscription, there is the mandate that there shall be no prohibition of "the free exercise" of religion. The founders of our government and the drafters of our laws always held high in their minds and close to their hearts the sanctity of the Sabbath as they enacted legislation with reference thereto. Thus, it would be a violation of the First Amendment to compel people, who accept Sunday as a religious day, to work on that day.

The laws of America are not arbitrary, mathematical pronouncements devoid of policy, program or philosophy. America is a religious nation.* Of course, it is fundamental that no religious belief can be made a condition for holding public office and everyone is free to live and act without religious avowals of any kind. Nevertheless, our whole structure of government is founded, and it operates, upon the principle of a belief in a Supreme Being. Our legislative bodies and our courts bespeak religious reverence and call upon the Author of the universe for guidance and upholding of the truth, our Chief Executive proclaims days of prayer, and every monetary unit carries the legend "In God We Trust."

Universal recognition of the Deity in the affairs of men finds its most forceful expression on the Sabbath, not only because of church services on Sunday, but also because that day is dedicated to the reunion of families, the manifestation of filial and parental affection, the fraternization among neighbors, and the general disposition toward acts

* Justice Douglas of the Supreme Court of the United States said, in the case of *Zorach v. Clauson* (343 U. S. 306—1952): "We are a religious people."

of charity and benevolence. Say what one will, man is more disposed to do good on Sunday than he is throughout the week. Less crimes are committed on the Sabbath Day than on week days. The whole body of the people seems to recognize on Sunday a general truce in the commercial, industrial and professional area which might be regarded quite extra-ordinary during the week. Justice Harlan of the United States Supreme Court in the case of *Hennington v. Georgia*, 163 U. S. 299, quoted with approval from Justice Field who, while discussing a statute of California relating to the Sabbath day, said:

> "Its requirement is a cessation of labor. In its enactment, the legislature has given the sanction of law to a rule of conduct, which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion, among philosophers, moralists and statesmen of all nations, as on the necessity of periodical cessation from labor. One day in seven is the rule, founded in experience and sustained by science * * * The prohibition of secular business on Sunday is advocated on the ground that by it the general welfare is advanced, labor protected, and the moral and physical well-being of society promoted." (*Ex Parte* Newman, 9 California 502.)

No one recognizes and appreciates these truths more than the working people of America. They have struggled long and arduously to achieve a just measure of recompense for their labors and an appropriate period of time for rest and recuperation and for intimate companionship with their families. These *desiderata* are now written into the fabric of our laws and have become as much a part of the public policy of the nation as the principles enunciated in the Declaration of Independence. Breaches in that policy,

without an imperative necessity stemming from reasons of health, security and general welfare, must not be permitted under artificial reasoning such as that advanced by the plaintiff in this lawsuit.

To allow the plaintiff to do what it contends for here, would be to make Sunday no different from Tuesday or Thursday because if the plaintiff can operate with 40 employees on Sunday, a larger establishment can operate with 400, all of whom would be taken from their families and all of whom would thus be deprived of the reverential, inspirational and recreational benefits inherent in the Sabbath Day. Chief Justice Warren aptly said in the case of *McGowan v. State of Maryland*, 366 U. S. 420, 444.

> "Numerous laws affecting public health, safety factors in industry, laws affecting hours and condition of labor of women and children, weekend diversion at parks and beaches, and cultural activities of various kinds, now point the way toward the good life for all. Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations."

Sunday Closing Laws contribute to the building of character because the rest and relaxation of the Sabbath are enjoyed in the general atmosphere of a Divinity which guides destiny, invites introspection and retrospection, and invokes a deeper appraisal of what one owes to his fellowman and to society. It is a truism, which can be attested to by anyone who has experienced the contrast, that the repose of Sunday is more restful and salubrious to him than inactivity on a weekday. The absence of work on a weekday means merely the shutting down of the human machine for a day, but the leisure of a Sunday carries

with it the spirituality which has been gained through centuries of dedication to spirituality.

It is another truism that a day of rest is more meaningful, more rehabilitating and more conducive to elevated thoughts when it is enjoyed with others, than when it is spent alone, while the remainder of society fends and fights in the mundane antagonisms of a week day. Justice Bell well said, in the case of *Specht v. Commonwealth,* 8 Pa. 312, that "all agree that to the well-being of society, periods of rest are absolutely necessary." He then cogently added that "to be productive of the required advantage, these periods must recur at stated intervals, so that the mass of which the community is composed, may enjoy a respite from labor at the same time." (Emphasis supplied.)

In *McGowan v. Maryland,* 366 U. S. 420, 450, Chief Justice Warren said:

> "The State's purpose is not merely to provide a one-day-in-seven work stoppage. In addition to this, the State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility—a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the everyday intensity of commercial activities, a day on which people may visit friends and relatives who are not available during working days."

The law of 1961 here in controversy reaffirms the principles enunciated in the Act of 1794 by outlining punishments for those who engage in the business of selling or dealing at retail in certain products on Sunday. Therefore, the Act of 1961 must be read in the light of the torch whose solemn incandescence has never dimmed since it was ignited in 1794.

But the plaintiff in the case at bar sees only one tiny spark peripherally shooting off from that torch and apparently believes it may snuff out the entire torch if it can smother that one spark. And so, the plaintiff minutely studies and dissects individual words in the Act of 1961, closing its eyes to the whole structure of language built up on the subject of Sunday Closing Laws, and which must be considered when one, as one must, under the Statutory Construction Law, consider "the occasion and necessity for the law."

The statute of 1961, like any document, must be read in the climate and atmosphere which saw it come into existence. A statute cannot be dissected into individual words, each one being thrown on the anvil of dialectics to be hammered into a meaning which has no association with the words from which it has violently been separated.

The plaintiff declares that the statute of 1961 is unconstitutional for vagueness because it

> "does not inform us as to whether less than ten working only on Sunday invokes the exception or whether it applies only to those having a total of less than ten employees even if they do not all work on Sunday."

A reading of Exception No. 1 clearly demonstrates that it applies only to such establishments that employ less than 10 persons at *any* time. The purpose of Exception No. 1 is to allow small stores to operate for necessitous purposes. It is common knowledge that, despite the ever-swelling dimensions of modern metropolises, a high percentage of the Commonwealth's population still lives in small towns or semi-rural communities, where restaurants and hotels are not as plentiful as lamp posts. In the absence of those modern dining facilities, the non-urban people turn to what has, for the last century or two, been the all-pro-

vider, as a hen with her chicks, for the village, hamlet, and town, namely, the corner grocery store. Thus, the General Assembly legislated into permanent Sunday existence this purely American institution. To prevent, however, that the little shop should take on a size and shape which would turn it into something more than the proverbial corner grovery store, the Legislature placed a limit of 9 persons on the number who could be employed in the store.

An establishment which employs a hundred persons during the week may not operate on Sunday, even if it calls out to work on that day only 9 persons. With the phenomenal development of automation it is possible to conceive of a supermarket employing 100 persons during the week, which could, with the use of these 100 employees, install devices which could be operated by 9 persons on Sundays. Such an operation could cater to large crowds, building up mass movement and traffic conditions leading to the crass commercialization of the Sabbath which the laws of Pennsylvania, down through the centuries, have consistently determined to prohibit.

The language of Exception No. 1 is not vague. It says that the Act shall not apply "to any retail establishment employing less than ten persons." It does not say any *Sunday* establishment. It says *establishment* period.

The plaintiff asks what would happen if the proprietor of a store prepared potato salad, cole slaw and hot dogs and at the same time sold fresh meats, produce and groceries in such volume that he employed 1,000 persons? The answer is that he would be arrested if he did this on Sunday, because he would fall under the provisions of Exception No. 1 which says that the sale of fresh meats, produce and

groceries must be accomplished by not more than 9 persons. The preparation of potato salad, cole slaw and hot dogs comes under Exception No. 3, which will be discussed later.

The plaintiff asks why should there be a distinction between a grocery store which employs 9 persons and one which employs 10 persons? The answer is that a line must be drawn somewhere. Why is a young man under 21 exempt from contractual obligations involving non-necessaries and one who is 22 not so exempt? If the line were not drawn at 21, where would the next stop be? At 30, 40, 55?

Exception No. 2 is a humanitarian one. There are many small family-owned grocery stores from which a family derives its livelihood. It would be unjust to shut down this type of a store, while allowing the operation of marts which employ 9 persons. Since members of an immediate family do not, except in rare instances, go into an excessively numerous figure, there is no danger that a corner grocery store could swell into a mammoth supermarket manned by polygamists boasting hundreds of children.

The plaintiff asks, What is an immediate family? The New Random House Dictionary (published in 1966) defines family (this being the first definition in the list of meanings) as "Parents and their children, whether dwelling together or not." Of course, we know that the word "family," in itself, is capable of a far more extensive scope. It can include aunts, uncles, nephews nieces, cousins, and so on, but it is clear that the exception clause in the statute under consideration was not intended to embrace the whole span of consanguineal and in-law relatives. The statute restricts the word "family" to "immediate family." This

restricts the phrase to lineal relatives and excludes collateral relatives. In *Miller v. Preitz,* 422 Pa. 383, 390, this Court, under special circumstances not here present, said that the word "family" may include nephews but it pointed out that the language there being interpreted "was not intended to be unduly restrictive." Here the language *is* intended to be unduly restrictive. It says immediate family" and *that,* considering the obvious intention of the Legislature, can only mean husband, wife and children. To have the exception go beyond that circle of relatives would make meaningless the whole intent of the exception, namely, to restrict Sunday operations to small stores. If "immediate family" were to be interpreted to include uncles, aunts, nephews, brothers, sisters, cousins, grandchildren, the whole purpose of the exception would be lost because such an expansion of the family could fill an Ark.

The second part of Exception No. 2 might seem to be troublesome, if taken literally. Exception 2 says that the penal provisions of the Act shall not apply to a store where the enumerated commodities "are offered or sold by the proprietor or members of his immediate family OR employing less than ten persons." (Emphasis supplied.) Here, we must have recourse to the Statutory Construction Act which says that the intent of the Legislature is paramount and that, in determining that intent, the Court must be guided by the presumption "that the Legislature does not intend a result that is absurd, impossible of execution or unreasonable." (Statutory Construction Act, *supra:* § 52, 46 P. S. 552.) The word "or" in Exception No. 2 was plainly intended to be conjunctive rather than disjunctive. This sometimes happens and such an interpretation received the imprimatur of this Court long ago. In *Rolland v. Commonwealth,* 82 Pa. 306, 326, Justice Paxon said:

"We are therefore led to the conclusion that the word 'or' in the 135th section should be read 'and', which make the offense that of burglary at common law. Such a mode of construing a statute is not without precedent. It was done by this Court in Murray v. Keyes, 11 Casey 334; Bolin v. Shiner, 2 Jones 205; Foster v. Com. 8 W. & S. 77."

In *United States v. Fisk*, 70 U. S. 445, the Supreme Court of the United States said:

"In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe 'or' as meaning 'and' and again 'and' as meaning 'or'".

As late as 1966, we approved of this interpretation in the case of *Appointment of Guardian of Ann Petrash*, 425 Pa. 433.

What was the intention of the Legislature in Exception 2? It was to allow family-owned stores to operate, because, in any case, the number of persons in an immediate family could not be large. At the same time, the Legislature could not intend to deny to the family-operated store a privilege assured the non-family operated stores. Thus, even a small family-owned store might need help to operate it, and so, the Legislature said it could employ less than 10 persons. Accordingly, Exception 2 is to read that the penal provisions of the Act shall not apply "to any retail establishments where fresh meats, produce and groceries are offered or sold by the proprietor or members of his immediate family *and* employing less than ten persons." To read the bridge between the two parts of the exception in the disjunctive would make the second part of Exception No. 2 blatantly redundant because Exception No. 1 already

limits the employees by retail establishments to a crew of less than 10 persons.

Why did the Legislature add, after excepting family-owned stores, the right for the family to employ personnel up to the number of 9? Although the Act is a short one, it is as full of meaning as a coconut is with milk. Let us suppose a family-owned store where the immediate family consists of only the husband, wife and one child. Not to allow this type of an owned store to employ help would be to discriminate against it, since, any other grocery store, under Exception No. 1, may hire up to 9 persons. Hence, the addition of the clause that the family-owned store may employ up to 9 persons.

The plaintiff argues that it is a family-held corporation and thus should be exempt under Exception No. 2. This reasoning is fallacious because Exception No. 2 necessarily encompasses the concept of a family operating the store, "offering and selling" commodities. Thus would exclude a corporation, which is a fictitious being, a mere creation of the law, even though the stock of the corporation might be held by only one family. The corporation cannot physically stand in the store to "offer and sell".

Exception No. 3 is intended to exclude from the law's operation such establishments where the food is prepared on the premises for human consumption. This exemption could particularly apply to delicatessen stores where salads, sandwiches, puddings, baked beans, stewed vegetables, pastries, fruits and so on, are prepared for human consumption. "For human consumption" means more or less, immediate human consumption, that is, food which requires no further preparation before being consigned to the grinding molars, the taste glands and the gastric juices of the hungry consumer.

Whether the food is actually consumed on the premises is immaterial, but it must be ready for consumption when the customer purchases it. In addition, the vendor, in order to obtain the benefit of Exception No. 3, must prepare, on his premises, the food he sells. The record does not indicate that the plaintiff prepares his commodities on the premises. The plaintiff speaks of "slicing, cutting, dressing, trimming, cleaning and packaging", but this is not preparation in the sense of the statute. Preparation must embrace more than cutting a large piece of meat into smaller pieces, it means more than taking an item out of a large package and selling it in a smaller package. If the plaintiff's stock in trade consisted only of what is prepared elsewhere, the exception would devour the prohibition. To exempt everything from a law is to include nothing. It would be like saying that horseback riding is prohibited in a certain park except to horsemen, or to say that the roasting of popcorn is prohibited unless the popcorn pops.

"To prepare" means to make ready. In relation to food, *to prepare* means, according to Webster's Dictionary, "to get ready for eating by due assembling, dressing or cooking." Taking cans of preserved tomatoes out of a large wooden case and selling the cans separately would not be "assembling, dressing or cooking."

The wizardry of science, the ingenuity of chefs, and the resourcefulness of food mechanics may soon reach the point, if it has not already indeed passed that stage of culinary magic, where a whole meal, from the proverbial soup to the proverbial nuts, may be sealed into a single can, so that all the Park Avenue hostess would need, in order to serve in a grand style, would be a can opener and a lorgnette.

The preparation referred to in Exception No. 3 inevitably includes cooking, but it is not limited to cooking because

such exclusion would reduce the nation to a minor disaster area, since sandwiches to Americans are what rice is to the Chinese, liverwurst to the Germans, pasta to the Italians, smorgasbord to the Scandinavians, and blubber to the Eskimos.

The plaintiff takes the verb "prepare" and tries to stretch it to include every possible stage of preliminary work which goes into the final product it sells over the counter. Lassoing a steer is part of the preparation of selling beef. Transporting the steer is another part of the preliminary work which leads to the eventual sale of porterhouse steaks. Slaughtering it, skinning it, and quartering it are all part of the preparation, but no one in the full possession of the four quarters of his brain would argue that under the statute of 1961; someone could operate a ranch, a railroad, a slaughterhouse and a grocery store, all on the basis that every stage of the journey from the prairies to the delicatessen counter is part of the preparation of a roast beef sandwich.

As already stated, the plaintiff attempts to analyze the Act of 1961, as if it were a wholly disassociated act of the Legislature and as if it had nothing to do with the Sunday Closing Laws. This is like trying to descend from the 10th floor of a building to the 1st floor in one jump. It cannot be done without disaster. One cannot read the Act of 1961 without having before him the Act of 1794, one cannot analyze the Act of 1961 without keeping in mind at all times the purpose of the Act of 1794 and Sunday Closing Laws in general. The argument advanced by the plaintiff, if accepted, would completely destroy the intent and purpose of Sunday Closing Laws, which have become an integral part of the American way of life. The American workingman is entitled to a day of rest with his family. While it is obvious that, because of works of necessity, charity, and

recreation, some persons will be required to toil on Sunday, the number so engaged must be kept at a minimum. That is the keystone of the Sunday Closing Laws as they span nearly three centuries of American life.

Thus, the law looks with a wary eye on any loosening of that keystone. Every decision of the Pennsylvania Courts indicates that Sunday Closing Laws are to be interpreted in order to avoid a weekday commercialization of the Sabbath that would lessen reverence for the holy day, as proclaimed in the original Act of the General Assembly, the succeeding relevant Acts, and all the decisions interpreting those Acts. If one supermarket may employ 40 persons under a loose reading of the law of 1961, then a super-supermarket may employ 600, a super-super-supermarket may employ 6,000 until Sunday may become a day of paganism in violation of the intention of the founders of our nation, the architects of the Commonwealth of Pennsylvania, and the expression of all the jurists treating this subject.

In its brief the plaintiff has asked many questions, as already indicated, seeking to demonstrate that the statute of 1961 is vague and constitutes special legislation. Most of the questions have been far-fetched. For instance, the plaintiff has asked if a store may legally employ 100 persons if the proprietor is present at the sales. The answer to that is found in Exception No. 2 which explicitly states that no family-owned store may employ more than 9 persons.

The plaintiff argues, in support of its thesis of vagueness, that if the interpretation of the three exceptions is to limit, in any event, the employment of persons to 9 persons, there would be no need for Exceptions 2 and 3 because Exception 1 already places the limit on employees at 9. But that

is not the interpretation nor the language of the Act. Exception No. 1 restricts the grocery store to the employment of 9 persons. Exception No. 2 restricts operation of the store to immediate family members and a hired force of not more than 9. Exception No. 3 makes no restriction on the number that may be employed, but specifically declares that the food for sale must be prepared on the premises for human consumption, and the obvious inference, as already indicated, is that the food is to be eaten reasonably soon and not stored. The simplest illustration of what Exception No. 3 aims at is, of course, the delicatessen store.

The plaintiff argues that the statute is unconstitutional by characterizing it as "special legislation," citing in this respect *Chalmers v. City of Philadelphia*, 250 Pa. 251. In that case the Supreme Court declared unconstitutional a law which provided that an engineer operating a steam boiler or engine over 10 horsepower was required to have a license, whereas those operating an engine under 10 horsepower did not have to have such a license. The difference between that situation and the one at bar is obvious. A steam boiler or engine is intrinsically a hazardous instrumentality and could inflict harm whether its horsepower measured 5 or 50. But the classification of less than 10 persons in the statute of 1961 has nothing to do with mechanical hazard. The problem presented here is that of size, and size of itself is a proper criterion for classification. (*Durkin v. Kingston Coal Co.*, 171 Pa. 193).*

Certainly a statute which prohibits the entrance of animals into an establishment could make an exception for dogs, but it could not be maintained successfully in opposition, that because an exception is made for dogs, it would

* "The definition found in the act of 1891 seems to us reasonable to be within the fair limits of a legislative definition, and to exclude only such operations as are too small to make the general regulations provided by the act applicable to them."

be "special legislation" to exclude elephants. A small store may present no difficulties in mass movement but a large store employing hundreds of clerks and catering to thousands of customers could produce traffic congestion, unbearable noises and a general condition wholly violative of the intent and purpose of the Sunday Closing Laws. The Supreme Court of the United States said in the case of *Two Guys from Harrison-Allentown v. McGinley*, 366 U. S. 582:

> "It was within the power of the legislature to have concluded that these businesses were particularly disrupting the intended atmosphere of the day because of the great volume of motor traffic attracted, the danger of their competitors also opening on Sunday and their large number of employees. 'Evils in the same field may be of different dimensions and proportions, requiring different remedies * * * Or to reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind * * * *The legislature may select one phase of the field and apply a remedy there, neglecting the others.*'" (Emphasis supplied.)

This recognition by the Supreme Court of the United States of the right of the legislature to legislate in one field to the exclusion of other fields should be the answer to the rather frivolous objection that to exempt the grocery store from the prohibitions of the Act of 1961 would be to introduce "economic discrimination" against the large stores. This is like the horse in the fable that said to the rooster that it was only fair that if the rooster tramped on the horse's feet the horse had the right to tramp on the rooster. How can the small grocery store possibly hurt the giant supermarket by tramping on its mastodonic feet?

The exception of the corner grocery store from the operation of the Act of 1939 is the same kind of exception which was made in the parent Act of 1794 for "private families, bake-houses, lodging houses, inns, and other houses of entertainment" and for ferrymen "carrying over the water travellers or persons removing with their families on the Lord's Day."

We affirm the decision of the lower court that the Act of 1961 is constitutional. We wish, however, to correct an erroneous interpretation on the subject of penalties for violation of the Act of 1961. The Act provides that whoever violates the Act shall—

> "upon conviction thereof a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one (1) year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty (30) days in default thereof."

The lower Court stated that if an offender repeats his offense after a lapse of one year following his first offense he shall be treated as a first offender. This could be an invitation to recidivism. No reason supports the analysis that one who continues to flout the law should, after a period of time, be treated as if he were an innocent bungler unaware of the seriousness of law violation. We hold that anyone who violates the law of 1961, after having already been convicted of a violation, shall be subject to the increased penalty of his subsequent offense occurring within one year after the conviction of the next preceding offense. To illustrate, if a person is convicted of his first offense on January 1, 1967, of his second offense on July 1, 1967,

and his third offense on January 2, 1968, he would be subjected to the increased penalty for the offense of January 2, 1968, even though a year had passed since his first offense of January 1, 1967.

In his Dissenting Opinion, Justice Cohen introduces a matter wholly extraneous to the issues involved in this appeal. In so doing, he makes critical observations on an action taken by Justice Musmanno in a situation factually related, but not jurisprudentially pertinent, to the questions advanced in this appeal. Justice Musmanno replies to Justice Cohen in Appendix A, which immediately follows this Opinion.

The Decree of this Court of Common Pleas of Beaver County is affirmed.

Chief Justice Bell and Justice Roberts file Concurring Opinions. Justices Eagen and Jones concur in the result. Justice Cohen files an opinion on Vacating Decree. Justice O'Brien files a Dissenting Opinion.

APPENDIX A

Reply by Justice Musmanno to Statement by Justice Cohen

Justice Cohen has filed an Opinion entitled "Opinion Vacating Decree". In that Opinion, toward the end thereof, he introduces a statement about a matter which is of no more relevance to the issue in this case than is the rainfall of Kalamazoo. However, since he has introduced the statement and it will be printed in the State Reports, I find myself, as Senior Associate Justice of this Court, compelled, in order that the readers of the State Reports may not be led astray, to point out what, in Justice Cohen's statement, is rain, and what is mist and myth.

It would appear from Justice Cohen's statement that he must have read the record in this case through impervious glasses or in a drenching downpour. Otherwise he could not have failed to see that it was agreed in the Court below by all the parties involved in the litigation, that, pending disposition of the issue of constitutionality of the controverted Act of 1961, there would be no arrests in Beaver County under the Act. I quote from the record:

> "Mr. Masters: [District Attorney] We have agreed, your Honor, until such time as the constitutionality of this act is determined we will not harass or make any threats or arrest anyone in regard to this particular operation until such time as this Preliminary Injunction hearing has been completed and until the constitutionality has been determined.
>
> I add that originally the County Detective's Office did make threats that there would be arrests made, but now since this action has been filed and the matter has to be—the constitutionality of the act has to be determined, we will restrain from any arrests being made until such time as the act is—the constitutionality of the act has been determined.
>
> The Court: You will also use the prerogatives of your office so far as emphasizing this to local, municipal and other officials?
>
> Mr. Masters: I will advise all of the law enforcement agencies named as Defendants in this law suit, being not only the County Detectives but the State law enforcement officers and the municipal officers, that the matter is pending before the Court and until the constitutionality is determined no arrests shall be made."

Now, it is as clear as the skyline of Kalamazoo, after the rain, that all the law enforcement authorities in Beaver County, with the approval of the presiding Court, officially

asserted in open Court that there would be no arrests in Beaver County under the Act of 1961 until its constitutionality was decided by the Court which had the authority to decide it, namely, this Court.

In addition to failing to note the contents of the record in this case, Justice Cohen, in his eagerness to study weather precipitation in Kalamazoo, ignored what is a matter of judicial notice, namely, that the Common Pleas Court in Allegheny County has also restrained the District Attorney of Allegheny County from enforcing the Act of 1961 until this Court passes on its constitutionality.

All this is a matter of common knowledge. In spite of this universal notice on the judicial state of affairs appertaining to the Act of 1961, a W. L. Clark in Beaver County filed three separate informations against John Bertera, President of Bertera's Hopewell Foodland, Inc., charging him with violation, on October 15, 1967, of the Act of 1961. The arguments on the appeal taken by the appellant in the instant case were heard on September 27, 1967. Thus, although Mr. Clark knew that Mr. Bertera, as President of Bertera's Hopewell Foodland, Inc., was actually involved in the case pending before the Supreme Court, he instituted criminal proceedings against Bertera. This, obviously, he had no right to do. This, obviously, amounted to defiance of the Courts of Beaver County and of the Supreme Court of Pennsylvania, actually holding jurisdiction over the very subject matter Clark was now trying to re-litigate before a Justice of the Peace Court.

On October 18, 1967, John Bertera averred under oath the facts above recited and his attorney filed in the Supreme Court of Pennsylvania, Western District (Pittsburgh, where I have my judicial chambers) a petition for a writ of prohibition against Justice of the Peace Otto Hughes

who had ordered the arrest of Bertera and who had expressed his purpose of holding a hearing on the informations on Friday, October 20, only two days away.

It was necessary to act at once, if the integrity of litigation before this Court was not to be collaterally attacked. The situation demanded immediate attention if the prestige of the Supreme Court of Pennsylvania was not to be lowered. Certainly a Justice of the Peace could not re-arrest a defendant whose conviction was on appeal. Certainly no lower Court could order execution of a defendant while his appeal is pending before a high Court, and no Judge could be called a Judge if he did not use the power of his office to prevent an illegal execution. It must be emphasized that the defendant in the criminal proceedings in Beaver County was the *same person* involved in the proceedings in the Supreme Court. It must be reiterated that the *same question* was involved in both courts, namely, the constitutionality of the Act of 1961.

Since my Supreme Court chambers are located in the same building which houses the office of the Prothonotary of the Western District of this Court, the Petition for Writ of Prohibition was brought to me. After I studied the documentation I telephoned the Chief Justice in Philadelphia and made a report on what was before me. I recommended that the writ be granted. He agreed with my recommendation. I said that I would send the papers to the Chief Justice for action. The Chief Justice said that since I had the papers I should sign the Order. And I did so.

Justice Cohen somehow finds objection to this. I believe the situation demanded immediate action. Otherwise the defendant could have been committed to jail over the weekend, while his case was being considered by the highest

Court in the Commonwealth. The prospect of a litigant in the Supreme Court of Pennsylvania being jailed by a Justice of the Peace, while his case is in the Supreme Court, is so fantastic and bizarre that I wonder why Justice Cohen, no matter how hard it is raining in Kalamazoo, cannot see it.

There are times when a Judge, if he has any appreciation of the responsibilities of his office, must act at once to save the liberties of the people and perhaps even their lives. A Judge is a Judge.

Justice Cohen himself acted on this principle in a case where intervention was far less demanding than here. On May 18, 1964, there was presented to the Supreme Court, Middle District (in Harrisburg), a Motion for a Temporary Restraining Order on behalf of a certain Stanton A. Berkowitz. In some manner not apparent in the record the Petition got to Justice Cohen who lives in York, Pennsylvania. Justice Cohen entertained jurisdiction at once. He did not grant a rule to show cause, he did not consult a single member of the Court, he did not give the respondent an opportunity to file an Answer. Justice Cohen, without batting an eye or turning a page of the Rules of Civil Procedure, dipped his pen into the ink well and, in a bold hand which would have done credit to the signature of John Hancock, signed the order attached to the Petition. What did this order command? This was not a simple prohibition on a Justice of the Peace, who, minor though he may be, is still part of the State's judiciary. Justice Cohen projected his authority into a wholly different department of the State, the Executive Department.

Justice Cohen flashed an order on a member of the Governor's Cabinet, the Secretary of Health. Peremp-

torily he told the Secretary of Health that he could not fire one of his employees, the Stanton A. Berkowitz above mentioned. It was possible that the Secretary of Health wished to fire Berkowitz because he believed Berkowitz was incompetent to operate the Henry R. Landis State Hospital, of which he was Institutional Business Manager. There was nothing in the motion for temporary restraining order which excluded the possibility that Berkowitz's presence in the hospital was perilous to the well-being of the sick patients. Justice Cohen nevertheless imperiously ordered the Secretary of Health not to fire Berkowitz.

The writ of prohibition I signed may have saved Bertera from a couple days' jail. Justice Cohen's restraining order could have depopulated the hospital, if Berkowitz was infected with a contagious disease, which could not be excluded, so far as the record shows. The petition for the restraining order simply said that Berkowitz was a Civil Service employee and could not be dismissed, but no Civil Service regulation prevents an administrator from restraining or taking off the job someone who has become irresponsible. Justice Cohen had no way of determining whether the dismissal was due to politics or a plague.

Justice Cohen did, in his impetuous, self-generated, nonconsulting order, state that the Secretary of Health would be allowed nine days hence to present his case against Berkowitz but, in nine days, the hospital, if it was being badly administered by Berkowitz, could have killed off all its patients.

And so, reverting to the rainfall of Kalamazoo, what has Justice Cohen established by his introducing into his Opinion a matter which can have no bearing on the constitutionality of the Act of 1961?

One other matter needs to be mentioned. Justice Cohen entitles his Opinion—OPINION VACATING DECREE.

This is incorrect. An Opinion cannot vacate a decree. The Opinion can be an Opinion on Vacation of a Decree, but it cannot vacate a Decree. But this is something for Kalamazoo grammarians to determine. Anyhow, in that awkwardly entitled Opinion Vacating Decree, Justice Cohen says in footnote No. 1.

> "Rule 235 of the Pa. R. C. P. requires notice to the Attorney General when an Act of Assembly is alleged to be unconstitutional and the Commonwealth is not a Party. The record does not disclose that Rule 235 was complied with. It would be most unfortunate to permit an adverse ruling on the constitutionality of an Act of Assembly to be made without notice to the Attorney General."

The fact of the matter is that, contrary to Justice Cohen's *ipse dixit*, the District Attorney of Beaver County did comply with the Rules of Civil Procedure. And if Justice Cohen, before his foray into Kalamazoo, had attentively read the record he would have found, on page 20a thereof:

> "Mr. Masters [District Attorney of Beaver County]: At the outset, your Honor, I would like to place upon the record that all the conclusions of the last hearing the Honorable Judge asked me to inform the Attorney General's office to see if they had any interest in this matter, and immediately upon leaving the court room I advised the Attorney General as to the proceedings and as to the date and as to what was involved, and to this date I have received no answer or no reply from the office of the Attorney General."

And so, Justice Cohen's tempest in a fish bowl or a storm in a teacup has, we hope, been stilled.

Appendix C-2

CONCURRING OPINION, BELL, C. J.

(Filed November 28, 1967.)

The amended Act of September 27, 1961 is difficult to interpret because parts of it are so indefinite and vague. The Act provides:

"No. 696

"AN ACT

"Amending the act of June 24, 1939 (P. L. 872), entitled 'An Act to consolidate, amend and *revise the penal laws** of the Commonwealth,' prohibiting certain business activities on Sunday.

"Section 1. The act of June 24, 1939 (P. L. 872), known as 'The Penal Code,' is amended by adding, after section 699.14 [699.13 in original], a new section to read:

"Section 699.15. Selling or Otherwise Dealing in Fresh Meats, Produce and Groceries on Sunday. —Whoever engages in the business of selling or otherwise dealing at retail in fresh meats, produce and groceries on Sunday shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one (1) year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty (30) days in default thereof.

"Each separate sale, or offer to sell, shall constitute a separate offense.

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* Italics throughout, ours.

"Informations charging violations of this section shall be brought within seventy-two (72) hours after the commission of the alleged offense and not thereafter.

"This section shall not apply to any retail establishment employing less than ten persons or to any retail establishment where fresh meats, produce and groceres are offered or sold by the proprietor or members of his immediate family or employing less than ten persons nor shall it apply to any retail establishment where food is prepared on the premises for human consumption."

I believe this amendment of the Penal Code, including the first two exemptions, is Constitutional and (1) does not violate (a) the Equal Protection Clause or (b) the Due Process Clause of the Fourteenth Amendment, and (2) does not constitute a law respecting the establishment of religion within the meaning of the First Amendment (which is made applicable to the States by the Fourteenth Amendment) and (3) does not amount to invidious discrimination or unreasonable classification.

An Act is presumed to be Constitutional, and may not be declared Unconstitutional unless it violates the Constitution clearly and plainly.* *Rubin v. Bailey*, 398 Pa. 271, 157 A. 2d 882; *Allentown School District*, 370 Pa. 161, 87 A. 2d 480; *Evans v. West Norriton Township*, 370 Pa. 150, 87 A. 2d 474.

Although the Act is poorly drawn, the objectives and purposes of this Act, *viz.*, "selling or otherwise dealing [at retail] in fresh meats, produce and groceries on Sunday," were, under prior decisions of this Court and prior decisions of the Supreme Court of the United States (which

* Frequently expressed "clearly, palpably and plainly."

I am compelled to follow), (1) secular** in nature and (2) such classification is reasonable. That Court justifies its conclusions and decisions on the ground that the reason, purpose and objective of virtually every Sunday Closing Law* is to provide a uniform day of rest, recreation, peace and repose for all citizens, with certain permissible or necessary exceptions. *McGowan v. Maryland*, 366 U. S. 420; *Two Guys v. McGinley*, 366 U. S. 582; *Braunfeld v. Brown*, 366 U. S. 599; *Bargain City U. S. A., Inc. v. Dilworth*, 407 Pa. 129, 179 A. 2d 439; *Rubin v. Bailey*, 398 Pa., *supra*.

We start with the well settled principle that the Legislature may validly and Constitutionally enact a law to prohibit all worldly business on Sunday, with the exception of necessities or acts of charity. *Two Guys v. McGinley*, 366 U. S. 582, *supra* (pages 590, *et seq.*); *Commonwealth ex rel. v. American Baseball Club of Phila.*, 290 Pa. 136, 138 A. 497, and cases cited therein; *Commonwealth v. Nesbit*, 34 Pa. 398; *Johnston v. Commonwealth*, 22 Pa. 102; *Specht v. Commonwealth*, 8 Pa. 312; *Commonwealth v. Bauder*, 188 Pa. Superior Ct. 424, 145 A. 2d 915, affirming 14 Pa. D. & C. 2d 571; *Commonwealth v. Taber*, 188 Pa. Superior Ct. 415, 145 A. 2d 908, affirming 14 Pa. D. & C. 2d 591.

Moreover, because the penalties for violations are so severe and repetitive and would cause plaintiff irreparable loss to his business and there is *no adequate* remedy for a person accused of or arrested for a violation of this Act except in Equity, Equity has jurisdiction. *Kingsley Inter-*

** These decisions admit that the origin of the Act was undoubtedly religious and I personally believe that its principal purpose and objective is still primarily and principally religious. This is crystal clear from the original Section 699.4 of the Penal Code of 1939, which provides (P. L. 952): "Worldly Employment or Business on Sunday.—Whoever does or performs any worldly employment or business whatsoever on the Lord's day, commonly called Sunday (works of necessity and charity only excepted). * * *"

* Sometimes called "Sunday Blue Laws."

national Pictures Corp. v. Blanc, 396 Pa. 448, 456, 153 A. 2d 243; *Adams v. New Kensington,* 357 Pa. 557, 560-561, 55 A. 2d 392; *Duquesne Light Co. v. Upper St. Clair Township,* 377 Pa. 323, 341, 105 A. 2d 287; *Harris-Walsh, Inc. v. Dickson City Boro,* 420 Pa. 257, 264, 216 A. 2d 56. See, also, *Rubin v. Bailey,* 398 Pa., *supra;* and *Bargain City U. S. A., Inc. v. Dilworth,* 407 Pa., *supra.*

In *Kingsley International Pictures Corp. v. Blanc,* 396 Pa., *supra,* the Court, quoting from *Adams v. New Kensington,* 357 Pa., *supra,* said (p. 456): " 'But equity does have jurisdiction to enjoin such a [criminal] prosecution where it is alleged not only that the statute or ordinance is unconstitutional and void but that its enforcement would cause the plaintiff irreparable loss to his property, either by effecting, if not a total suppression of his business, at least a grave interference therewith, or by subjecting him to the imposition of cumulative, exorbitant and oppressive penalties pending judicial determination of the validity of the legislation. In such cases, the ground of equitable jurisdiction is the protection of property rights, *and the fact* that a criminal proceeding is involved is merely incidental [citing cases].' "

It is hornbook law that a legislature has the power to establish reasonable classifications, provided they have a reasonable basis and are not unjustly discriminatory. The test as to whether an Act is unconstitutional because it is unjustly discriminatory, or constitutes class legislation, or is an unconstitutional classification, is whether the classification is reasonable and is founded upon a real or genuine and not an artificial or arbitrary distinction. *Chartiers v. Allegheny County Board,* 418 Pa. 520, 539-540, 211 A. 23, 487; *Kurtz v. Pittsburgh,* 346 Pa. 362, 31 A. 2d 257, and cases cited therein.

Although not mentioned in the Majority Opinion or in any of the Dissenting Opinions, this Sunday Closing Act is a *criminal* statute and therefore must be *strictly* construed against the Commonwealth. Statutory Construction Act, May 28, 1937, P. L. 1019, Article IV, Section 58(1); *Commonwealth v. Derstine*, 418 Pa. 186, 210 A. 2d 266; *Commonwealth v. Glover*, 397 Pa. 543, 156 A. 2d 114. So construed, I would limit the language of the Act and the interpretation of its exemptions (1) to retail establishments which throughout the week, as well as on Sunday, employ less than ten persons, and (2) to family operated small retail stores, and I would include in the "immediate family" husband, wife, children, grandparents, brothers and sisters, uncles, aunts, nephews and nieces, and (3) to retail establishments, where food consisting of meats, produce and groceries are prepared on the premises for human consumption.

I believe the words "retail establishments" in the third exemption were intended to exempt small stores which sell at retail fresh meats, produce and groceries, such as delicatessen and grocery stores, but were not intended to exempt restaurants. However, this particular exemption clause is so vague and indefinite and uncertain that this third exemption cannot be Constitutionally sustained. With this exception, I would sustain the Constitutionality of the Act.

Appendix C-3

CONCURRING OPINION, ROBERTS, J.

(Filed November 28, 1967.)

ROBERTS, *J.*

Despite an opinion laced with support for the small businessman, love for the family, and reverence for the Sabbath, the majority totally fails to resolve, discuss, or even isolate the most important issue here presented: Does a statute which permits grocery stores employing less than ten people to open on Sunday, but which compels other grocery stores employing more than that number to close, violate the equal protection clause of the Constitution of the United States? In my opinion, an adequate answer to a question of this magnitude requires more than the conclusory assertion "a line must be drawn somewhere." Furthermore, a study of the cases in this area convinces me that the statute here challenged *is* constitutionally infirm.

I shall assume that the *raison d'etre* for section 1 of the Act of September 27, 1961, P. L. 1695, 18 P. S. § 4699.15, is, as stated by the majority, to eliminate the "traffic congestion, unbearable noises, and a general condition wholly violative of the intent and purpose of the Sunday Closing Laws." I am also aware that this Court should follow the holding in *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U. S. 582, S. Ct. 1135 (1961), in which the Supreme Court of the United States sustained, against an equal protection argument, our Act of August 10, 1959, P. L. 660, § 1, 18 P. S. § 4699.10 which interdicted the Sunday sale of certain products by any store, regardless of size. Nevertheless, I believe that *Two Guys* is distinguish-

able from the present case, and also that the statute here under attack will not accomplish the very purpose which the majority advances as the sole reason for its enactment.

Admittedly, the statute involved in *Two Guys* was carefully drafted to include those items usually sold by large discount department stores whose business activities on Sunday did indeed disrupt the peace and tranquility normally associated with our day of rest. However, unlike the present statute, the *Two Guys'* prohibition was aimed at *all* stores which sold the listed items, not just the larger establishments. Why, we might ask, did the Legislature resort to an "over-kill" statute, when it was concerned with an evil perpetrated only by the big-volume operators? To me the answer is clear. It is one thing to say, as the Supreme Court in *Two Guys* did say, that it is "within the power of the legislature to have concluded that these businesses [discount department stores] were particularly disrupting the intended atmosphere of the day because of the great volume of motor traffic attracted, the danger of their competitors also opening on Sunday, and their large number of employees." 366 U. S. at 591, 81 S. Ct. at 1140. But it is quite another thing to use this rationale as a lever to give a competitive boost to smaller establishments. For the Legislature to decide that supermarkets, as well as discount stores, disrupt the desired Sunday atmosphere, is to legislate within the rationale of *Two Guys*. Yet, when the statute exempts the corner grocery store from its prohibition, we inject the element of economic discrimination into our Sunday closing law, and thus create an entirely different situation from that faced by the Supreme Court in *Two Guys*.

By the great weight of authority, other state appellate courts that have been called upon to pass on Sunday clos-

ing laws which distinguished between establishments selling the same products have found such laws violative of the equal protection clause. For example, in *Terry Carpenter, Inc. v. Wood*, 177 Neb. 515, 129 N. W. 2d 475 (1964), the Nebraska Supreme Court unanimously invalidated a Sunday closing law that exempted stores employing not more than two people. That court did not even suggest that the Nebraska legislature could have had any constitutionally valid purpose in making this economic discrimination. A statute exempting selected coastal counties in New Jersey met with a similar fate before the Superior Court of that state. *Sarner v. Union Twp.*, 55 N. J. Super. 523, 151 A. 2d 208 (1959).[1]

The most frequently voiced equal protection argument based on economic discrimination has come in response to those closing laws whose exemptions result in permitting certain *types* of stores to open on Sunday and sell the same merchandise that neighboring stores, which are shut down, cannot sell. Although there is a split of authority in this area, a clear majority of the states have held their respective statutes violative of the equal protection clause of the Constitution of the United States. Two Illinois cases illustrate that the test in that state is whether the closing law gives a competitive advantage to one business

[1] The efficacy of this holding has in no way been undermined by *McGowan v. Maryland*, 366 U. S. 420, 81 S. Ct. 1101 (1961). The Supreme Court in *McGowan* did uphold a Sunday closing law that exempted the sale of certain recreational items by those merchants who operated bathing beaches or amusements parks in Maryland's resort county of Ann Arundel. However, the geographic distinctions made in the statute did not extend to all merchandise, as in *Sarner*. Moreover, the Ann Arundel provisions were clearly relevant to the legitimate legislative purpose of keeping bathing beaches operative and thus foster the recreational aspects of Sunday. In *Sarner*, any such legitimate purpose was obliterated by the carte blanche permission given to certain merchants to sell *anything* on Sunday as well as the senseless discrimination between different resort counties in New Jersey. Whether Anne Arundel County is the only Maryland resort county or whether, in fact, it was also the recipient of favorable legislative discrimination, as were the exempt counties in New Jersey, need not concern us here, for it was never argued, and hence never faced in *McGowan*.

over another. In *City of Mt. Vernon v. Julian,* 369 Ill. 447, 17 N. E. 2d 52 (1938), a closing ordinance was declared unconstitutional when it appeared that its exemptions permitted, *inter alia,* a grocery store to remain open and sell tobacco, while forcing a tobacco shop to close. Conversely, in *Humphrey Chevrolet v. City of Evanston,* 7 Ill. 2d 402, 131 N. E. 2d 70 (1955), an ordinance aimed at certain *commodities,* rather than the stores themselves, withstood attack by an automobile dealer when the court noted that *nobody* could sell cars on Sunday.[2]

There is one area, however, where an economically discriminatory closing law will be sustained. Significantly, in all the cases heretofore cited, state courts have noted that no valid legislative purpose could be found to sanction the economic schism produced by the statute. But where the facts are such that the economic discrimination *itself* is necessary to effectuate a state's legitimate dual interest in both lessening Sunday congestion and also increasing recreation, then the law may stand. Such a factual framework supports the holding in *McGowan v. Maryland,* 366 U. S. 420, 81 S. Ct. 1101 (1961). The Maryland statute, see footnote 1, *supra,* permitted the operators of bathing beaches and amusement parks in Anne Arundel County to sell merchandise incidental to the operation of those establishments.[3] Thus, the defendant discount store, for ex-

[2] See also *Nation v. Giant Drug Co.,* 396 P. 2d 431 (Wyo. 1964) (holding unconstitutional a closing law whose effect was, *inter alia,* that grocery stores could sell bread but bakeries could not, that drug stores could sell candy, but candy stores could not, and that gas stations could sell tires, but tire stores could not); *Broadbent v. Gibson,* 105 Utah 53, 140 P. 2d 939 (1943) (facts similar to *Giant Drug, supra*); *State v. Karmil Merchandising Corp.,* 158 Me. 450, 186 A. 2d 352, 365-66 (1962) (in upholding closing law, court was very careful to point out that the stores permitted to open were *not* engaged in the same business as respondent-department stores); *City of Hot Springs v. Gray,* 215 Ark. 243, 219 S. W. 2d 930 (1949) (semble). *Contra, Charles Stores Co. v. Tucker,* 263 N. C. 710, 140 S. E. 2d 370 (1965); *Kirk v. Olgiati,* 203 Tenn. 1, 308 S. W. 2d 471 (1957).

[3] The opinion in *McGowan* indicates that the Maryland statute now contains an additional exemption for Anne Arundel stores employing not more than

(Footnote continued on following page)

ample, could not sell suntan oil or rubber ducks on Sunday, although these identical items could be sold at bathing beaches. In sustaining this act, Mr. Chief Justice Warren stated: "Here again, it would seem that a legislature could reasonably find that these commodities, necessary for the health and recreation of its citizens, should only be sold on Sunday by those vendors at the locations where the commodities are most likely to be immediately put to use." 366 U. S. at 427-28, 81 S. Ct. at 1106.

The necessity for this minimal economic discrimination is plain. The legislature, of course, has the power to pass legislation encouraging the use of a state's recreational facilities on Sunday. But, the use of these facilities might be diminished if the public could not purchase, on the spot, the many and varied commodities needed to make the day of rest indeed restful. Furthermore, at best a minimal increase in traffic would result from the opening of a beach-front sundry store, since even the laziest of bathers would hardly use his car to travel from beach blanket to counter. On the other hand, if *all* stores could remain open to sell these supplies on Sunday, the traffic congestion could well exceed even the weekday flow, given the addition of beach traffic to the normal rush of shoppers.

The majority in the present case would have us believe that the *economic discrimination* in our statute is also necessary to decrease Sunday traffic while, at the same time, feed our population. I not only fail to share the majority's concern over the imagined starvation of our citizenry if small grocery stores could not be open on Sunday, but furthermore, as I read the present exemption for

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(Footnote continued from preceding page)

one person other than the owner. 366 U. S. at 423, 81 S. Ct. at 1103. However, since that amendment was added *after* the defendants were indicted, they did not argue that *it* was also unconstitutional. Accordingly, the Court did not pass on, or even discuss, this exemption.

stores employing less than ten people, this statute might not even decrease traffic! Although the majority insists that, if an establishment employs more than ten persons during the week it cannot open on Sunday with a staff of less than ten, the statute does not dictate this result. At best, the statute is silent on this question. It is therefore equally reasonable (if not more reasonable, since the statute is directed against Sunday sales) that any store may open on Sunday if it employs less than ten persons on that day. Thus, I find nothing in this closing law to prevent a large supermarket from opening on Sunday, staffed for that day only by a manager and eight checkout cashiers, or perhaps by a butcher, a manager and seven cashiers. The point is simply this. In the case of a supermarket which does not, even during the week, employ a traditional sales staff, it is not the number of employees which determines whether people will shop there on Sunday, but rather the availability of the merchandise itself which controls. I am not necessarily suggesting that supermarkets, for a *certainty*, will open on Sunday with skeletal staffs. I merely point out that the language in *McGowan* requires the very *clearest* showing that economic discrimination will *further* a legitimate state interest before this, or any other court, may countenance such discrimination in a Sunday closing law. Absent such a showing, the present case is indistinguishable from all those in which similar legislation has been struck down.

Ironically, if the majority is so concerned about the flow of traffic on Sunday, this flow would be best decreased if the first two exemptions in 18 P. S. § 4699.15 were eliminated. (I share the majority view that the third exemption is properly limited to restaurants or "take out" stores, and thus do not suggest that it is unconstitutional.) Contrary to the majority's position, I am certain that the

elimination of these two exemptions would not invalidate the entire section with the resulting opening of all supermarkets on Sunday, but would instead force them *all* to close. The Act of May 28, 1937, P. L. 1019, § 55, 46 P. S. § 555, provides that every statute shall be severable unless the court finds that the Legislature would not have enacted the law without the missing language, or that, without it, the statute is incomplete. Neither of these dangers are present here.

Clearly the statute would be complete without the exemptions. In fact, without them, the section merely has the effect of adding fresh meats, produce and groceries to the list of completely prohibited items for Sunday sales already set out in 18 P. S. § 4699.10 and upheld in *Two Guys*. Moreover, to conclude that without the exemption for small stores and family stores, the Legislature would not have enacted this section is to exalt the questionable economic discrimination present in this statute *over* the legitimate state interest in Sunday's tranquility—an exaltation that I would be loathe to ascribe either to our lawmakers or my brethren.

For all the foregoing reasons I firmly believe that the first two exemptions contained in this section violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States; and without constitutional sanction these exemptions cannot possibly stand, supported merely by the maxims advanced by the majority.

Appendix C-4

DISSENTING OPINION, O'BRIEN, J.

(Filed November 28, 1967.)

O'BRIEN, *J.*

I cannot subscribe to the conclusion reached by the majority of this court that the amendment to the Act of 1939, June 24, P. L. 872 § 699.4, 18 P. S. § 4699.4, enacted by the General Assembly as the Act of 1961, September 27, P. L. 1695 § 1, 18 P. S. § 4699.15, is constitutional. In reaching my conclusion, I need only heed the admonition of the majority and apply "common sense in the construing of words according to rules of grammar and according to their common and approved usage".

Clearly, the mere fact that all of the judges of the highest appellate court of the Commonwealth are unable to agree on the meaning of the legislative enactment, even with the aid of the Statutory Construction Act and all their experience in the interpretation of statutes, does not indicate that the statute is unconstitutional for vagueness. The fact of this disagreement does, however, indicate that the intendment of the statute is not so crystal-clear as the majority would have one believe. Even assuming, however, that the language of the statute admits of no interpretation other than that which the majority has reached, I conclude that the statute is void, since it is not based upon any reasonable or rational classification.

The statute involves attempts to do nothing other than prohibit the sale of fresh meats, produce and groceries on Sunday. At this point, there is nothing to be gained from any further discussion of the right of the Commonwealth to legislate in such fashion. The United States Supreme

Court, as properly pointed out by the majority, in *Two Guys From Harrison-Allentown v. McGinley*, 366 U. S. 582 (1961), has foreclosed any such speculations. In that case, the United States Supreme Court held clearly that it is within the power of the state to conclude that retailers of certain items were particularly disrupting the intended atmosphere of the day because of the disturbances inherent in their operations. I would be remiss if I did not note in passing that this decision was based not upon any religious grounds, but wholly and solely upon the State's right to legislate for the economic well-being of its citizenry. I therefore find it unnecessary to make any comments relative to the majority opinion's preoccupation with the religious history of the Commonwealth and Nation. Such discussions are, in my view, irrelevant to the determination of the issues at hand.

The Act under attack says that: "Whoever engages in the business of selling or otherwise dealing at retail in fresh meats, produce and groceries on Sunday shall [be guilty of a violation and punished according to the Statute]. This section shall not apply to any retail establishment employing less than ten persons or to any retail establishment where fresh meats, produce and groceries are offered or sold by the proprietor or members of his immediate family or employing less than ten persons nor shall it apply to any retail establishment where food is prepared on the premises for human consumption." I can readily accept the conclusion of the majority that a reasonable distinction can be made between establishments employing nine people and those employing ten or more. As aptly stated by the majority, the line must be drawn somewhere, and it requires no stretching of the rationale of *Two Guys* to reach the conclusion that the type of disturbances sought to be avoided justifies the classification. It is even arguable

that where the proprietor or a member of his immediate family is engaged in the operation, an exception may be made.

This would be on the sole basis of protection of small, family enterprises against the competition of huge, competing enterprises. There is, however, no reasonable justification for excepting a retail establishment where food is prepared on the premises for human consumption, nor is there any valid justification for permitting an establishment to operate with an unlimited number of employees if only the proprietor or a member of his immediate family is engaged in the sale of fresh meat, produce and groceries.

From what I have just said, it is apparent that I do not agree with what the majority has held the statute to mean. For example, although the statute is totally ambiguous as to whether the "less than ten" exception means less than ten employees any day of the week or only on Sunday, the majority is certain that it means the former. If one interpretation had to be chosen, I would think the latter to be more logical. Since the Act is specifically directed to Sunday, the number of persons employed at any retail store on any day of the week other than Sunday would seem irrelevant to an interpretation of the statute. The Sunday closing laws have always tried to secure a respite from work, a day of rest and recreation. If a store with 1,000 employees during the week employs only nine on Sunday, then a major purpose of the law has been fulfilled in securing that respite from work for 991 employees. Regardless of which interpretation is more logical, the point is that either is maintainable. This is a criminal statute which is being interpreted; to require those potentially affected to guess at its meaning violates fundamental notions of due process.

Nor can I agree with the majority's interpretation of the second exception of the Act, namely, that "This section shall not apply * * * to any retail establishment where fresh meats, produce and groceries are offered or sold by the proprietor or members of his immediate family, or employing less than ten persons. * * *" The majority has come to the amazing conclusion that such an enterprise may not, in any event, employ more than nine persons. It is impossible for me to reach this conclusion except by ignoring completely the rules of grammar and the common and approved usage of the English language. The Act says that it shall not apply to a retail establishment where the items covered are offered or sold by certain people or to establishments employing less than ten persons. The language of the Statute is set out at length above, and it can be seen by a simple examination that the General Assembly saw fit to except from the provisions of the Act two separate and distinct types of retail grocery operations: those which employ fewer than ten persons and those where the proprietor or members of his immediate family are engaged in selling. The Act does not say that an exception is made for an establishment where the proprietor or a member of his family engages in selling and fewer than ten members are employed by the establishment; the Act says that an exception is made for any retail establishment which employs fewer than ten people, and a wholly separate exception is made for any retail establishment where the proprietor or a member of his immediate family is engaged in selling. If these are not two separate and distinct classes of exceptions, there was no need for the Legislature to use the disjunctive "or" not once, but twice, to set off those establishments employing fewer than ten people.

The majority says that the fact that "or" is used *twice* to set off establishments employing fewer than ten people

makes the second "or * * *" blatantly redundant unless we perform judicial alchemy to transform "or" into "and". The redundancy is undeniable; it merely emphasizes the defects in draftsmanship in this statute. Certainly the majority's reading of "or" as "and" does not remove the redundancy. If, as the majority concludes, family operated retail groceries are restricted to nine employees, then there is no need for the second exception of the statute. The first exception allowing the operation of establishments employing fewer than ten people would cover the field, and all of the subsequent language of the statute is mere surplusage. The family run store could employ help, so long as fewer than ten persons were working, under the first exception. Thus, reading "or" as "and" not only is a perversion of the English language, but one which ascribes to the General Assembly inclusion in a statute of language which is completely unnecessary.[1]

The very best that can be said for the second exception is that it is ambiguous. The majority states, by the tortuous alchemy we have referred to above, that the exception forbids the employment of more than nine persons. It is just as reasonable to conclude that under this wording, and establishment could employ any number of employees, provided that the proprietor or members of his immediate family are engaged in selling, as it is to conclude that even where this condition exists, employees are limited to nine. It is just as reasonable to conclude that under this wording, an establishment could employ any number of persons, but only so long as they were the proprietor or members of his immediate family. It is not at all clear from the language of the Act which of the many interpretations ad-

[1] In the cases cited by the majority where "or" was read "and", the legislative intent was clear. The transformations did not result in the statutes remaining just as confused as before the change was made. Nor did they broaden the scope of a criminal statute.

vanced or advanceable was intended. What is clear is that the majority has seen fit to adopt the most restrictive of all the possible interpretations as the only one which the language of the Act permits.

Similarly, the majority takes a restrictive view as to what constitutes an "immediate family", asserting it to be husband, wife, and children. Should parents, or grandchildren, or perhaps nieces and nephews living in the household of the proprietor be included? No Pennsylvania case has defined "immediate family", but those from other states indicate that it has a broader meaning than that ascribed to it by the majority. One case has held that it includes a mother-in-law and father-in-law, *Grant-Morris Management Corp. v. Weaver*, 166 N. Y. S. 2d 610, 7 Misc. 2d 449, while another has indicated that a daughter-in-law, not even living with her husband's parents, may well be included within the term. *Cincinnati, N. & C. Ry. Co. v. Peluso*, 293 S. W. 2d 556. That case cited Ballentine's Law Dictionary, defining immediate family as "those members of the same household who are bound together by ties of relationship". The questions raised by this vague term can only be answered by the legislature. The ambiguity should be fatal in a criminal statute.

In its interpretation of the third exception, "where food is prepared on the premises for human consumption", the majority repeats its error of assuming that its interpretation is the only plausible one. Such is surely not the case. "For human consumption", says the majority, clearly means "more or less, immediate human consumption". Disregarding the ambiguity in the majority's own use of "more or less", I ask what possible judicial omniscience can supply the word "immediate"? The legislature knew how to use that word when they wanted; in fact, they did so in referring to "immediate family" in the second excep-

tion. Although appellant raises the question whether "on the premises" modifies "prepared" or "consumption", I am inclined to agree with the majority that the placement of the modifier indicates the former. But I can by no means accept the majority's assertion that "slicing, cutting, dressing, trimming, and packaging * * * is not preparation in the sense of the statute."

Moreover, I cannot accept the majority's interpretation that the food for sale must be prepared on the premises. The statute says that the section shall not apply *"to any retail establishment* where food is prepared on the premises for human consumption" (Emphasis added). Inasmuch as the statute by its title applies to grocery-type establishments—"Selling or otherwise dealing in fresh meats, produce, and groceries on Sunday." it would seem that a supermarket which barbecued chickens or operated a delicatessen counter could employ an unlimited number of persons while its counterpart without the added feature would be limited to nine. This is a classification which is supportable on no grounds that I can conceive. Yet it hardly is a proper answer to avoid the irrational classification by giving the statute an interpretation its words will not yield.

I conclude that the Act is void for vagueness and I would therefore reverse the decree of the court below.

In view of the approach taken in some of the other opinions in this case indicating the result that would obtain if the exceptions were held to be void for vagueness, I would like to comment on that matter. I agree with the majority that the elimination of the exceptions would invalidate the entire section. They are so inextricably tied to the remainder of the statute that the statute is incomplete without them. However, this does not necessarily mean that all supermarkets could remain open on Sunday. It means

that the validity of their opening must be tested under the provisions of the general Sunday closing law of June 24, 1939, P. L. 872 § 699.4, 18 P. S. § 4699.4.

I dissent.

Appendix C-5

OPINION VACATING DECREE, COHEN, J.

(Filed November 28, 1967.)

COHEN, *J.*

The majority apparently sanctions the appellant's resort to the courts of equity to restrain a criminal prosecution. Generally, our courts have been diligent in preventing the use of equity in the restraint of criminal prosecutions. We require that there be not only a substantial question regarding the constitutionality of the statute, but also a showing that its enforcement would cause irreparable damage to property.

Applying that rule to the present situation, Bertera complains that even though the Act of June 24, 1939, P. L. 872, § 699.4, 18 P. S. § 4699.4, and the Act of September 27, 1961, P. L. 1695, § 1, 18 P. S. § 4699.15 make it a crime to engage in certain businesses on Sunday, nevertheless, he has a large investment in his store which was made in the expectation of being able to operate that store on Sunday. He further alleges that the Act of 1961 permits certain retail establishments (not his) to operate on Sunday. Hence, he says, the Act is unconstitutional as to him.[1]

[1] In *Bargain City U. S. A. Inc. v. Dilworth*, 407 Pa. 129, 179 A. 2d 439 (1962), and *Rubin v. Bailey*, 398 Pa. 271, 157 A. 2d 65 (1960), our Court held that the Sunday closing laws were not violative of the Constitution of the Commonwealth. These two decisions and the United States Supreme Court decision in *Two Guys From Harrison, supra*, demonstrate that the constitutional validity of the Sunday closing laws has not been sufficiently impugned by the complaint filed here to warrant the intrusion of equity in the restraint of criminal prosecution.

If the Act of 1961 were wholly unconstitutional, Bertera would then be subject to prosecution under the Act of 1939, P. L. 872. If the Act of 1961 is not totally unconstitutional, but the exemption is an unconstitutional exemption, the Act would be in effect without the exemption, and there is no allegation on Bertera's part that the Act without the exemption is unconstitutional. Consequently, he would be prohibited from engaging in business regardless of the constitutionality of the exemption in the 1961 Act; and the proposed enforcement of the Sunday Closing Laws cannot under any circumstances be considered an unconstitutional interference with his business. Thus, Bertera's position is unsound. Our Sunday laws generally have been upheld against constitutional attack. *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U. S. 582, 81 S. Ct. 1135, 6 L. ed. 2d 551 (1961), *Braunfeld v. Brown*, 366 U. S. 599, 81 S. Ct. 1144, 6 L. ed. 2d 563 (1961). Therefore, I take it that Bertera cannot successfully maintain that he could operate on Sunday without violating one or more constitutionally valid statutes. Even if the exemption contained in the Act of 1961 were invalid, the only result of striking it down would be to leave the Act in effect without the exemption, thus prohibiting Bertera from opening in any event. I see no substantial question of constitutionality here which justifies equity in assuming jurisdiction. Under these circumstances it is unnecessary even to consider the extent of harm to Bertera's business.[2]

I would vacate the decree of the court below and remand this proceeding to that court with instructions to dismiss the complaint for want of jurisdiction.

I regret that there is another aspect of this litigation which requires comment. While our Court had this case under consideration, a petition for a writ of prohibition

was filed on Bertera's behalf; and without notice to or answer by the parties sought to be restrained, the following order was entered:

"Now, this 18th day of October, 1967, upon presentation of the foregoing Petition for Writ of Prohibition, it is ordered and directed that such Writ be issued and that:

"(a) Justice of the Peace Otto Hughes is enjoined and prohibited from holding a hearing on the informations filed with him by Woodrow L. Clark charging John Bertera with violating the 1961 Statute of the Sunday Blue Laws, Section 699.15 added September 27, 1961, P. L. 1695. Sec. 1 (18 P. S. Sec. 4699.15) while the constitutionality of said statute is under challenge and pending in this Beaver County Test case.

"(b) Justice of the Peace Otto Hughes and all other Justices of the Peace in Beaver County, Committing Magistrates and persons entitled to act in the capacity of Committing Magistrates in Beaver County, who being similarly situated, constitutes a class, and whose numbers make it impracticable to name are enjoined and prohibited from taking any information from any persons whatsoever for alleged offenses under the 1961 Statute of the Sunday Blue Laws Section 699.15 added September 27, 1961, P. L. 1695. Sec. 1 (18 P. S. Sec. 4699.15) while the constitutionality of said statute is under challenge and pending in this Beaver County test case.

BY THE COURT:

MUSMANNO,
Justice of the Supreme Court of Pennsylvania".

The entry of this order was not the action of the majority of our Court but was the unilateral act of one member. No individual member of our Court has the power to issue a writ of prohibition, just as no individual member of our Court has the power to quash an appeal, grant a new trial, or affirm or reverse a lower court's judgment.

In *Schlesinger Petition*, 367 Pa. 476, 81 A. 2d 316 (1961), Chief Justice Drew, in reviewing the proceedings followed when a petition for writ of prohibition is filed, stated on page 479: "On May 29, 1951, the petitioner [Schlesinger] filed this petition for writ of prohibition, and we, on the same day, granted a rule on Judge Musmanno to show cause, returnable June 4, 1951, and stayed all proceedings until further order of this Court."

In *Dauphin County Grand Jury Investigation Proceedings (No. 2)*, 332 Pa. 342, 343, 2 A. 2d 802 (1938), the proceedings pertaining to the issuance of a writ of prohibition were described as follows: "The chairman of the House Investigating Committee then filed a petition in the Supreme Court for a writ of prohibition. A rule to show cause was granted by the Supreme Court, and proceedings were stayed pending the disposition of the case. A return to the rule was filed by the presiding judge. * * *"

In both cited cases and in every case published in our Reports, the courts have followed the correct procedure; that is, upon the filing of a petition for a writ of prohibition, the Court grants a rule on the party sought to be restrained, thus giving the party an opportunity to answer. The Court may or may not stay proceedings pending disposition or further order. After the party sought to be prohibited files his return to the rule, the Court, *not a single member thereof,* either without or after oral argu-

ment determines whether the writ should issue. This is the only proper and constitutional procedure upon application for a writ of prohibition.[2]

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[2] The procedure in the case of *Berkowitz v. Wilbar*, 416 Pa. 369, 206 A. 2d 280 (1965), may be summarized as follows:

On January 9, 1958, Berkowitz's position at the Henry R. Landis State Hospital was established as one within the "classified service" category. On November 1, 1963, Berkowitz received notice from the Director of Personnel of the Department of Health, at the instance of the Governor of the Commonwealth, that his status had been changed to place him in the category of "unclassified civil service." On April 24, 1964, Berkowitz was notified by letter that his employment with the hospital was to terminate on May 12, 1964.

On May 1, 1964, Berkowitz appealed to the Commission contending that his change to "unclassified civil service" was illegal. The Commission determined that since he was in the "unclassified service" he had no right to a hearing. Berkowitz then filed a complaint in equity in the Commonwealth Court on May 12, 1964, against the Secretary of Health of the Commonwealth of Pennsylvania seeking a preliminary injunction to restrain the Secretary from dismissing him from his position with the hospital. The Court denied the injunction and Berkowitz took an appeal to our Court.

On May 18, 1964, I issued an order restraining the Secretary of Health from dismissing Berkowitz from his position and from interfering with or denying him any rights guaranteed him under the Civil Service Act and that such order should continue until argument on the restraint on May 26, 1964. Every member of our Court was notified by letter on May 18th as to the action taken in this matter. The order I issued staying Berkowitz's dismissal was dissolved.

On the appeal our Court held that Berkowitz's remedy was by way of an action in mandamus and not by an action seeking a preliminary injunction. Berkowitz instituted an action in mandamus to compel the Civil Service Commission to grant him a hearing. The Commonwealth Court issued an order directing the Commission to grant a hearing. The Commission complied and found the re-classification improper and ordered Berkowitz to be reinstated with back pay. After appeal to our Court on January 6, 1967, our Court handed down an opinion affirming the Commission's order. *Wilbar v. Berkowitz*, 424 Pa. 154, 225 A. 2d 538 (1967).

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

BERTERA'S HOPEWELL FOODLAND, INC. *v.* MASTERS ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT.

No. 1132. Decided April 8, 1968.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.